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No. ____

In the

SUPREME COURT OF THE UNITED STATES

STATE OF WASHINGTON, Petitioner,

v.

LOREAL KINZY, Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the community caretaking exception to the warrant requirement of the Fourth Amendment applies outside the context of automobile searches and can justify a brief detention of a person that law enforcement officers reasonably suspect may be in danger?

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IN THE SUPREME COURT OF THE UNITED STATES

STATE OF WASHINGTON, Petitioner,

v.

LOREAL KINZY, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

The State of Washington, represented by Norm Maleng, Prosecuting Attorney for King County, Washington, respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of the State of Washington in this case.

OPINIONS BELOW

The decision of the Washington Supreme Court is State v. Kinzy, ___ Wn.2d ___, 5 P.3d 668 (2000) (App., *infra* 1a-50a.)

JURISDICTION

The judgment of the Washington Supreme Court was entered on July 27, 2000. This Court has jurisdiction pursuant to 28 U.S.C. sec. 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Washington's Family Reconciliation Act, Wash. Rev. Code 13.32A.050(2), provides that "[a] law enforcement officer shall take a child into custody: . . . (2) [i]f a law enforcement officer reasonably believes, considering the child's age, the location, and the time of day, that a child is in circumstances which constitute a danger to the child's safety or that a child is violating a local curfew ordinance."

STATEMENT OF THE CASE

At 10 p.m. on the night of March 3, 1998, Seattle police officers were on routine bicycle patrol in downtown Seattle when they saw Loreal Kinzy walking down the street. She looked extremely young. The officers believed that she was between 11 and 15 years old. She was walking in a high narcotics area with three other individuals who appeared to be in their early twenties. The officers recognized one of the other individuals from previous narcotics arrests. App., *infra*, 2a-3a.

The officers attempted to contact Kinzy by asking her to stop. They were concerned for her safety given her young age, the time and the location. They suspected she was a child in danger. The officers' intent was to find out her age, why she was downtown, who she was with, whether she knew the people she was with, and whether she needed help, as required by Washington's Family Reconciliation Act. They did not suspect her of criminal activity. App., *infra*, 2a-4a.

The trial court found that the officers' testimony was credible, and that their actions were based on concerns for Kinzy's safety and were not a pretext for criminal investigation. App., *infra*, 4a-6a.

After requesting her to stop twice--requests that she ignored--one of the officers placed his hand on Kinzy's arm to stop her. Upon inquiry, Kinzy told the officers that she was 16 years old. The officers did not believe that she was 16, and sought to verify her identity by checking her name and date of

birth in the State database. App., *infra*, 3a.

While the verification was taking place, Kinzy refused to make eye contact with the officers, tried to turn her back on them, and repeatedly put her hands in her pockets or up the sleeves of her bulky jacket. After Kinzy ignored repeated requests to keep her hands in view, the officers conducted a pat down search for weapons. App., *infra*, 3a.

The officers felt a hard object in one of Kinzy's pockets. In the course of securing the hard object, the officers observed white flakes on the inside of Kinzy's coat that appeared to be cocaine. A field test confirmed that the flakes contained cocaine. App., *infra*, 3a-4a. The officers placed Kinzy under arrest. More cocaine was discovered on Kinzy's person during a search incident to arrest. App., *infra*, 4a.

Kinzy was charged with possession of cocaine. She moved to suppress the cocaine, contending that it was fruit of an unlawful stop pursuant to the Fourth Amendment of the United States Constitution. The trial court denied Kinzy's motion to suppress the evidence. App., *infra*, 1a.

The trial court found that the initial stop was justified because the officers reasonably believed that Kinzy was a child in danger. The court found Kinzy guilty as charged. App., *infra*, 8a.

The Washington Supreme Court reversed Kinzy's conviction. The court ruled that the officers lacked articulable suspicion to conduct a Terry stop of Kinzy. App., *infra*, 11a-

12a. The court recognized that absent suspicion of criminal activity, an encounter may be justified by the "community caretaking function" exception to the Fourth Amendment if the officers reasonably believed that someone needed assistance for health or safety reasons. App., *infra*, 12a-13a. Nonetheless, the court concluded that the officer's concerns for Kinzy's safety did not outweigh her privacy interests. App., *infra*, 16a-18a. In reaching this result, the plurality appears to conclude that a person may not be detained pursuant to the community caretaking function. The plurality opinion states that Kinzy "should have been able to walk away and terminate the encounter" since the officers did not "suspect[] she had committed a crime." App., *infra*, 16a. The court's reversal was based solely on the Fourth Amendment, not on state constitutional grounds. App., *infra*, 11a, n. 33. The cocaine found on Kinzy was held to be fruit of an unlawful seizure. App., *infra*, 19a.

Four members of the court dissented, stating that pursuant to the plurality opinion, "police can no longer detain children at risk, runaways, mentally ill or intoxicated persons, and others in distress unless they have a warrant." App., *infra*, 29a. The dissent recognized that no warrant could be obtained in such circumstances, since there is no suspicion of criminal activity. App., *infra*, 43a-46a. Thus, the dissent notes that the plurality opinion in effect eliminates the community caretaking exception unless the need for community caretaking fortuitously

coincides with a suspicion of criminal activity. App., *infra*, 29a. The members of the dissent would have held that the detention of Kinzy was justified under the community caretaking exception to the Fourth Amendment because the officers reasonably believed that Kinzy was a child in danger. App., *infra*, 43a.

REASONS FOR GRANTING THE PETITION

There are three reasons to grant this petition. First, while this Court has repeatedly recognized the "community caretaking" exception to the warrant requirement of the Fourth Amendment in regard to automobile searches, this Court has not addressed the question of whether the exception extends beyond automobile searches. As a result, the state supreme courts and courts of appeal are seriously divided as to the proper scope of the community caretaking exception. Until this Court addresses this question, the conflicts and confusion among the state and federal courts over this issue will continue. Finally, the scope of the community caretaking exception in general, and its application to efforts by law enforcement to protect at-risk youth in particular, is a recurring question of substantial national importance.

I. While This Court Has Recognized the Community Caretaking Exception to the Warrant Requirement of the Fourth Amendment in Regard to Automobile Searches, This Court Has Yet To Address Whether The Exception Extends Beyond Automobile Searches.

In Cady v. Dombroski, 413 U.S. 433 (1973), this Court recognized a "community caretaking" exception to the warrant requirement of the Fourth Amendment. The Court noted that police officers serve numerous functions in society, some of which are totally divorced from the investigation of crimes. Cady, 413 U.S. at 441. The Court termed these responsibilities "community caretaking functions." Cady, 413 U.S. at 441. The Court held that a search or seizure of an automobile conducted in furtherance of a community caretaking responsibility was constitutional if the intrusion was reasonable. Cady, 413 U.S. at 447. In that case, a non-investigatory search of a drunk driving suspect's impounded vehicle for a gun believed to be there was found to be reasonable under the Fourth Amendment. Cady, 413 U.S. at 448. The community caretaking exception has been invoked by this Court in two other cases. In South Dakota v. Opperman, 428 U.S. 364 (1976), the defendant challenged an inventory search of his impounded vehicle. Citing Cady and police community caretaking functions, this Court held that inventory searches of vehicles made pursuant to standard police

procedures are reasonable under the Fourth Amendment. Opperman, 428 U.S. at 368, 376.

In Colorado v. Bertine, 479 U.S. 367 (1987), the defendant challenged a search of a closed backpack found in his impounded vehicle during an inventory search. Noting its deference to "police caretaking procedures," this Court held that the search, which was conducted according to standardized procedures, was reasonable. Bertine, 479 U.S. at 372, 376.

Professor LaFave has explained the community caretaking exception as follows:

> In addition to their crime prevention and crime detection responsibilities, police are by design or default called upon to render a great variety of other public services. In carrying out these varied responsibilities, the police sometimes conduct searches for some purpose other than that of finding evidence of criminal activity. Generally, it may be said that the courts have upheld such searches when made reasonably and in good faith, even though evidence of crime is inadvertently discovered as a consequence. This is true as to searches of persons, premises, and vehicles, and also as to searches into personal effects.

3 W. LaFave, Search and Seizure, sec. 5.5(d), at 200 (3d ed. 1996).

As reflected in Professor LaFave's commentary, and the lower court opinions cited below, many have concluded that the rationale for allowing reasonable community caretaking searches or seizures extends beyond automobile searches performed to protect property. It is difficult to imagine that this Court intended to limit the scope of community caretaking to the

protection of property in automobiles. However, this Court has never applied the community caretaking reasoning outside the context of an automobile search. Whether the community caretaking exception to the Fourth Amendment is a valid exception outside the context of automobile searches remains an open question. That question is squarely presented in this case. Certiorari should be granted in this case so that this Court can address this important issue, and give much-needed guidance to the federal and state courts.

II. The Courts of Appeal and State Supreme Courts are Seriously Divided Over the Application of the Community Caretaking Exception Outside the Context of Automobile Searches.

There is a substantial conflict among the states as well as the courts of appeal as to the scope of the community caretaking exception to the warrant requirement of the Fourth Amendment. There is also substantial confusion in some jurisdictions as to whether community caretaking is an exception to the warrant requirement of the Fourth Amendment at all.

Such confusion is demonstrated by the plurality opinion in the present case. The plurality appears to conclude that a detention of a person cannot be justified by performance of a community caretaking function. In other words, community

caretaking functions can only justify consensual encounters with citizens. See App., *infra*, 13a-16a (nominally recognizing the community caretaking function but holding that Kinzy was entitled to walk away and terminate the encounter because the police officers had no articulable suspicion of criminal activity). But this Court has held that consensual encounters do not implicate the warrant requirement of the Fourth Amendment. I.N.S. v. Delgado, 466 U.S. 210, 215-216 (1984). Thus, to hold that community caretaking concerns can only justify consensual encounters is to hold that there is no community caretaking "exception" to the warrant requirement of the Fourth Amendment at all.

Similar confusion has been demonstrated by the Supreme Court of Illinois. In People v. Murray, 137 Ill.2d 382, 560 N.E.2d 309, 311 (1990), the Illinois court elaborated on the "three tiers of police-citizen encounters": arrest, Terry stop and community caretaking function. The court declared that a community caretaking function "involves no coercion or detention and therefore does not involve a seizure." Murray, 560 N.E.2d at 311. Thus, like the Washington Supreme Court, the Illinois court appears to have concluded that only consensual encounters can be undertaken in performance of community caretaking functions.

In contrast, another state has concluded that performance of community caretaking functions can justify a variety of searches and seizures. In People v. Davis, 442 Mich. 1, 497

N.W.2d 910, 919-20 (1993), the Michigan Supreme Court relied on the community caretaking exception recognized in Cady v. Dombrowski, supra, in concluding that entries into private dwellings made to render aid to persons in distress are reasonable under the Fourth Amendment.

Similarly disparate results can be seen among federal circuits that have addressed the question of the proper scope of the community caretaking exception. Several circuits have held that the community caretaking exception recognized in Cady is only applicable in cases involving automobile searches. U.S. v. Bute, 43 F.3d 531 (CA10 1994); U.S. v. Erickson, 991 F.2d 529, 532 (CA9 1993); U.S. v. Pichany, 687 F.2d 204, 208-09 (CA7 1982).

In contrast, other circuits have applied the community caretaking exception beyond the realm of automobile searches. In U.S. v. Rohrig, 98 F.3d 1506, 1509 (CA6 1996), police received early morning complaints of loud noise emanating from a residence. Officers responded to the residence, and observed that loud music from the residence could be heard from a block away. Rohrig, 98 F.3d at 1509. The officers banged repeatedly on the front door but received no answer. Rohrig, 98 F.3d at 1509. Finding the back door open, the officers entered the home and found the defendant unconscious and found many marijuana plants. Rohrig, 98 F.3d at 1509. The officers turned down the music and woke the defendant. Rohrig, 98 F.3d at 1509. Although the Sixth Circuit conceded that the loud music did not

pose a substantial or immediate threat to the safety of the neighbors, the court cited Cady and held that the officers actions were a reasonable response to the ongoing breach of peace, and thus within the community caretaking exception. Rohrig, 98 F.3d at 1521-22.

Similarly, in U.S. v. Rideau, 949 F.2d 718, 720 (CA5 1991), the Fifth Circuit approved the detention of the defendant, a pedestrian, under the community caretaking exception. The officers observed the defendant standing in the roadway late at night, and saw him stumble as he stepped from the road. Rideau, 949 F.2d at 719. The officers stopped and asked the defendant to identify himself. Rideau, 949 F.2d at 719. The defendant's failure to cooperate led to a patdown search that produced a loaded firearm. Rideau, 949 F.2d at 719. Citing Cady, the court held that the officers brief detention of the defendant was reasonable. Rideau, 949 F.2d at 720. In fact, the court concluded that the officers would have been "derelict in their duties" had they not stopped him since the defendant's standing in the road intoxicated was a hazard to himself and others. Rideau, 949 F.2d at 720.[1]

In sum, because this Court has recognized the

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[1]The court held, however, that the patdown search was unreasonable because it was not based on specific and articulable facts that the defendant might be armed. Rideau, 949 F.2d at 720.

community caretaking exception to the warrant requirement but never addressed its application outside the context of automobile searches, the state courts and courts of appeal have reached widely varying conclusions as to the proper scope of the exception. At the heart of the holding in Cady is this Court's recognition that the police have a very broad range of responsibilities, including much more than the enforcement of criminal laws. The proper performance of these duties sometimes necessitates intrusions into private affairs, such as detaining a mentally ill or intoxicated person, stopping an apparently disabled motorist, or checking on the welfare of a child that is on the streets without appropriate supervision.

The Fourth Amendment proscribes "unreasonable searches and seizures," and thus, the ultimate standard under the Fourth Amendment is reasonableness. Cady, 413 U.S. at 439; Camara v. Municipal Court, 387 U.S. 523, 538 (1967). Reasonable searches and seizures conducted in good faith performance of community caretaking functions should be approved.

III. The Application of the Community Caretaking Exception Outside the Automobile Search Context is a Recurring Question of Substantial National Importance.

The ability of the police to constitutionally engage in brief non-investigatory detentions of persons is recurring question of substantial national importance and should be addressed by this Court. The question of the legitimacy of non-investigatory detentions is particularly urgent in light of the emergence of "community policing" as a new policing philosophy. Under community policing models, being implemented in hundreds of police departments across the country, the role of the police is "broader, more dynamic, and more proactive than before." D. Livingston, Police Discretion and the Quality of Life In Public Places: Courts Communities, and the New Policing, 97 Colum. L.Rev. 551, 576-77 (1997).

In this case, the detention was motivated by concern that the very young-looking Kinzy was an at-risk youth, possibly a runaway, and thus in danger. In briefly detaining Kinzy, the officers were acting in accordance with Washington's Family Reconciliation Act, which requires an officer to take a child into custody if the officer "reasonably believes, considering the child's age, the location, and the time of day, that a child is in circumstances which constitute a danger to the child's safety." Wash. Rev. Code Annot. sec. 13.32A.050 (1993).

Police are often called upon to assist in locating and

helping runaways. Statistics indicate that there are approximately 1 to 1.3 million runaways or homeless youths in the United States each year. Phocas, Runaways and California's Juvenile Law: The Emancipation Option, 19 J.Juv.L. 46, 48 (1998). Leaving such children on the streets exposes them to abuse and crime, or to becoming criminals themselves. Id. at 56. Research suggests social programs can succeed in keeping these youth safe and out of trouble. Briscoe, Breaking the Cycle of Violence: A Rational Approach to At-Risk Youth, 61 Fed. Probation 3, 4 (1997). However, at-risk youth need to be identified and intercepted. Police officers play an important rule in such efforts as part of their community caretaking functions.

The same is true for the mentally or physically ill. Police officers may often be called upon to detain persons who appear to be ill, not because they suspect criminal activity, but because they believe the person is in danger, or is a danger to others. Such detentions are part of a police officer's community caretaking functions.

The constitutionality of detentions such as these is a matter of substantial national importance. As such, the issue presented by this case--whether a brief detention of a suspected runaway in good faith performance of a community caretaking function is reasonable under the Fourth Amendment--should be addressed by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

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APPENDIX

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

	)
	) Number 68239-9
STATE OF WASHINGTON,	)
	)
Respondent	)
	) En Banc
v.	)
LOREAL MONIQUE KINZY,	)
	)
Petitioner	) Filed
	) July 27, 2000

SMITH, J.--Petitioner Loreal Monique Kinzy seeks review of a decision of the Court of Appeals, Division I, which affirmed her conviction in the King County Superior Court, Juvenile Division, for possession of cocaine in violation of the Uniform Controlled Substances Act under RCW 69.50.401(d) and an order denying her motion to suppress evidence of cocaine.1 The Court of Appeals concluded the cocaine was not the fruit of an illegal 'search and seizure' because Respondent, acting under its community caretaking function, was lawfully entitled to 'seize' Petitioner, a 16-year-old minor.2 This Court granted review. We reverse.

QUESTION PRESENTED

The question presented in this case is whether, under the Fourth Amendment to the United States Constitution, the 'community caretaking function' exception permits police officers

to lawfully 'seize' a 16-year-old minor without a warrant when the officers have no reason to believe the minor has committed a criminal offense, but the minor is standing on a public sidewalk in a high narcotics trafficking area on a school night with several others, including an older person believed by the officers to be associated with narcotics.

STATEMENT OF FACTS

Petitioner Loreal Monique Kinzy, a minor born May 2, 1981, was charged by information in the Juvenile Department of the King County Superior Court on March 6, 1998 with possession of cocaine in violation of the Uniform Controlled Substances Act under RCW 69.50.401(d).3 During a fact-finding hearing on May 7, 1998, Petitioner filed a motion to suppress evidence of cocaine.4 The Honorable Liem E. Tuai, judge pro tempore, denied the motion and on July 30, 1998 signed 'Written Findings of Fact and Conclusions of Law to Comply with CrR 3.6,' which recited:5

I. THE UNDISPUTED FACTS:

1. On {Tuesday} March 3, 1998, Seattle Police Officers M.B. Jennings and D.K. Kim were working as uniformed bicycle patrol officers. At 2210 hours (10:10 p.m.) the officers encountered {Ms. Loreal Monique Kinzy} at the NorthWest {sic} corner of Third Avenue and Stewart Street in downtown Seattle. It was a school night. This area is known to the officers as a high narcotics trafficking area. {Ms. Kinzy} appeared to the officers to be

between 11 and 13 years old. {She} was in the company of two other girls and an older male. The older male was familiar to the officers due to previous narcotics contacts.

2. When the officers hailed {Ms. Kinzy}, she put her head down and continued to walk away. {She} was restrained by the officers and asked her age and name. At some point in time {Ms. Kinzy} told the officers that she was 16 years old. The officers did not believe that {she} was 16 due to her very youthful appearance. {Ms. Kinzy} acted nervous and kept putting her hands into her coat. She was patted down for weapons by Officer Jennings.

3. Officer {sic} felt a hard object in {Ms. Kinzy's} coat. When it was examined it turned out to be a comb/brush. Officer Jennings had {Ms. Kinzy} keep her coat open after discovering the comb, again for officer safety.

4. Officer Jennings saw what he suspected to be white/creme flecks of rock cocaine on the black lining of {Ms. Kinzy's} coat.

5. This suspicion was based on the officers {sic} experience with narcotics and his many narcotics related arrests.

6. Officer Jennings testified that the flecks were not 'lint' {sic} nor crumbs of food. By color and consistency, Officer Jennings identified the flecks as being possible rock cocaine.

7. The flecks field tested positive for cocaine.

8. Officer{s} Jennings and Kim testified that they perceived {Ms. Kinzy} to be a 'youth at risk' when they approached her.

9. Because of the high drug area, the hour, the fact that it was a school night, that {Ms. Kinzy} appeared so young in age, and due to one of her companions being associated with narcotics, {Ms. Kinzy} stood out.

10. After the field test came back positive for cocaine, {Ms. Kinzy} admitted she had more cocaine in her 'bra.'

11. After Miranda and arrest, additional cocaine was recovered from {Ms. Kinzy's} 'bra' when she was searched by Officer Kim at the SPD West Precinct.

II. REASONS FOR THE ADMISSIBILITY OF THE EVIDENCE SOUGHT TO BE SUPPRESSED:

1. The court finds that the Officers had a reasonable basis for approaching and questioning {Ms. Kinzy} to determine her age and whether she {sic} a youth at risk.

2. The court finds that due to {Ms. Kinzy's} perceived height of 4'9' (verified as 5'1' at fact finding), perceived age of between 11

and 13, the late hour, her presence in a high narcotics area, the fact that she was in the company of a person associated with narcotics, all added to provide the officers with proper grounds to approach {Ms. Kinzy} as a youth at risk.

3. The court finds that due to her furtive movements, bulky clothing and refusal to keep her hands in view, there was a reasonable and grounded concern for officer safety which prompts and justifies a pat-down for weapons.

4. The court finds that Officer Jennings acted reasonably when he requested {Ms. Kinzy} to keep her jacket open so he could see where her hands were.

5. The court finds that the Officers were lawfully engaging {Ms. Kinzy} based on their concerns for her safety as a potential youth at risk.

6. The court finds that {O}fficer Jennings saw, in plain view, what he thought to be particles of rock cocaine on the black lining of {Ms. Kinzy's} coat.

7. The court finds that Officer Jennings could differentiate between the suspected narcotics and other items such as lint or food crumbs because of his experience, both on the street and formal training, in the area of narcotics.

8. Relevant factors considered by the court, were taken in light of the circumstances at hand and the officers {sic} training and experience.

9. The court finds the testimony of the officers credible.

In addition to the above-written findings and conclusions, the Court incorporates by reference its oral findings and conclusions.{6}

Officer M.B. Jennings testified on direct and cross examination consistent with the written findings of fact:

A. I approached and we stopped and said, you know: Could you come here. She ignored us. We talked directly to her and said, you know: Young lady, could you please stop and come here. And she kept her hand {sic} down with her hands in her pockets and attempted to walk away. The rest of the group stopped. She was the only one that continued to walk away from us.

. . . .

Q. Did she ever stop walking?

A. We actually had to hold her arm to stop her from walking.

Q. Well, what did you ask her, what questions?

A. At that point we wanted to identify her. She looked young. We wanted to find out how old she was and to do a check for her safety and question her why she was downtown, what her purpose was, who she was with, was she with family, was she by herself, does she know these people, those kind of questions.

Q. Did you have any suspicions of drug activity regarding her?

A. Regarding her, no. We stopped her for her safety.

. . . .

Q. So your initial reason for contacting Loreal was not because you suspected her of any criminal activity; is that correct?

A. That's correct.

. . . .

Q. If she were to say to you: I'm 16, I'm fine, I don't need your help, would that have been sufficient for you to let her go?

A. No.

Q. So you wanted very specific details about her plans?

A. No, I wanted proof of her age. Because of her visual appearance, she did not look to be 16 years old.{7}

After hearing further testimony, Judge Tuai on May 7, 1998 found Petitioner 'guilty' of violation of the Uniform Controlled Substances Act under RCW 69.50.401(d).8 During a disposition hearing on June 4, 1998, the Honorable Deborah D. Fleck imposed upon Petitioner a 'manifest injustice' sentence of 32 weeks.9 Petitioner on that date filed a notice of appeal to the Court of Appeals, Division I.10

The Court of Appeals, Division I, the Honorable Susan R. Agid writing, in a majority opinion affirmed Petitioner's conviction and the order denying her motion to suppress evidence of cocaine.11 Petitioner claimed the cocaine was the fruit of an illegal search and seizure.12 The court disagreed and concluded that (1) the initial 'seizure' of Petitioner was reasonable under the 'community caretaking function' Exception to the warrant requirement, (2) the protective frisk of Petitioner was valid under Terry v. Ohio13 and (3) the plain view observation and simultaneous 'seizure' of cocaine flecks was valid under the 'plain view' exception to the warrant requirement.14

Petitioner then sought review in this Court. In her supplemental brief and petition for review, she raised only the issue of the validity of her 'seizure' under the community

caretaking function exception.15 Review was granted on November 2, 1999.16

DISCUSSION

STANDARD OF REVIEW

On May 7, 1998, Petitioner filed in the King County Superior Court, Juvenile Division, a motion to suppress evidence of cocaine. The court denied the motion and on July 30, 1998 signed findings of fact and conclusions of law to comply with CrR 3.6. '{I}n reviewing findings of fact entered under a motion to suppress, {this Court} will review only those facts to which error has been assigned.'17 Petitioner did not challenge the findings of fact on appeal to this Court.18 We must then treat them as verities.19

The findings of fact provide a chronology of five significant events on March 3, 1998, the date of Petitioner's arrest. First, Seattle Police Officers M.B. Jennings and D.K. Kim observed Petitioner in company with several others at 10:10 p.m., decided to approach her and then 'hailed' her.20 The record does not indicate the actual time of following events, but it is clear they followed instantaneously in sequence immediately after 10:10 p.m. Second, Officer Jennings grabbed Petitioner's arm as she began to walk away.21 Third, he patted Petitioner down for weapons.22 Fourth, Officer Jennings noticed cocaine flecks on Petitioner's coat and removed them for field testing.23 Fifth,

Petitioner 'admitted' she had more cocaine in her brass re after 'the field test came back positive for cocaine.'24

TIME	SEQUENCE OF EVENTS
10:10 p.m.	INITIAL OBSERVATION AND DECISION TO APPROACH PETITIONER
10:10 p.m. plus	OFFICER JENNINGS GRABBED PETITIONER'S ARM AS SHE WALKED AWAY
10:10 p.m. plus	PAT-DOWN FRISK OF PETITIONER BY OFFICER JENNINGS
10:10 p.m. plus	REMOVAL OF COCAINE FLECKS FROM PETITIONER'S COAT BY OFFICER JENNINGS AND FIELD TEST OF FLECK
10:10 p.m. plus	ACKNOWLEDGEMENT BY PETITIONER THAT SHE HAD A BAG OF COCAINE IN HER BRASSIERRE

Figure 1. Sequence of Events

Petitioner does not challenge the validity of the pat-down frisk, which the Court of Appeals concluded was reasonably 'based on 'specific and articulable facts' . . . that {Petitioner was} 'armed and presently dangerous."25 Neither does she challenge the removal of cocaine flecks, which the Court of Appeals concluded came within the simultaneous 'plain view' exception to

the warrant requirement.26 Nor does she challenge the validity of her admission concerning the bag of cocaine in her brassiere.27 Petitioner instead relies solely upon the 'fruit of the poisonous tree' doctrine.28 She claims the sequence of events beginning with the officer grabbing her arm were unconstitutional and thus tainted everything that followed, including especially 'seizure' of the bag of cocaine from her brassiere re.29

FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION

'As a general rule, warrantless searches and seizures are per se unreasonable' under the Fourth Amendment to the United States Constitution.30 'Nonetheless, there are a few jealously and carefully drawn exceptions to the warrant requirement which provide for those cases where the societal costs of obtaining a warrant . . . outweigh the reasons for prior recourse to a neutral magistrate.'31 The State bears the burden of showing a seizure without a warrant falls within one of these exceptions.32

The sole issue before this Court involves the further question whether one of these carefully drawn exceptions applies to the two events occurring prior to the pat-down frisk.33 Under Terry v. Ohio, police officers need not have a warrant to 'stop' a suspect if they have 'a reasonable, articulable suspicion that criminal activity is afoot.'34

In this case, the findings of fact do not support justification for a Terry stop because the first two sequential events of March 3, 1998 provide no indication of criminal activity

by Petitioner. Indeed, Officer Jennings testified his reason for initiating contact with Petitioner was simply concern for her safety and not suspicion of criminal activity.35 Because Respondent State of Washington cannot establish a valid Terry stop, it relies instead upon the 'community caretaking function' exception to the warrant requirement.

'COMMUNITY CARETAKING FUNCTION' EXCEPTION

The community caretaking function exception was first announced in Cady v. Dombrowski, which observed with respect to the Fourth Amendment of the United States Constitution that:

> Local police officers, unlike federal officers, frequently investigate vehicle accidents in which there is no claim of criminal liability and engage in what, for want of a better term, may be described as community caretaking functions, totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute.{36}

As noted in Cady, the community caretaking function exception is totally divorced from a criminal investigation.37

This Court first cited Cady in State v. Houser, a 1980 case involving impoundment of an automobile.38 Subsequent Washington cases have expanded the community caretaking function exception to encompass not only the 'search and seizure' of automobiles, but also situations involving either emergency aid39 or routine checks on health and safety.40 Both situations may require police officers to render aid or assistance.41 But compared with routine checks on health and safety, the emergency

aid function involves circumstances of greater urgency and searches resulting in greater intrusion.42 It applies when '(1) the officer subjectively believed that someone likely needed assistance for health or safety reasons; (2) a reasonable person in the same situation would similarly believe that there was a need for assistance; and (3) there was a reasonable basis to associate the need for assistance with the place searched.'43

The community caretaking function exception recognizes that a person may encounter police officers in situations involving not only emergency aid, but also involving a routine check on health and safety. In Kalmas v. Wagner, this Court concluded the exception applied when one of the parties 'called 911 asking for police assistance.'44 Under a routine check on safety, '{w}hether an encounter made for noncriminal, noninvestigatory purposes is reasonable depends on a balancing of the individual's interest in freedom from police interference against the public's interest in having the police perform a 'community caretaking function."45

Because this Court has not rendered any pertinent decision directly applicable to the principal issue in this case, we may consider some decisions of the Court of Appeals. If a person has not been 'seized,' balancing the interests usually results in favoring the action by police. The person's interest in being free from police intrusion is 'minimal' in the absence of a 'seizure.'46 In contrast, '{m}any citizens look to the police to assist them in a variety of circumstances, including delivering emergency messages, giving directions, searching for lost children, assisting

stranded motorists, and rendering first aid.'47 Considering the public's interest in having police officers perform community caretaking functions, 'police officers must be able to approach citizens and permissively inquire as to whether they will answer questions.'48

When a person has been seized, balancing the interests does not necessarily favor an encounter by police. 'A person is 'seized' within the meaning of the Fourth Amendment of the United States Constitution only when restrained by means of physical force or a show of authority.'49 The relevant inquiry is whether totality of the circumstances indicate 'a reasonable person would have felt free to leave or otherwise decline the officer's requests and terminate the encounter.'50 Consistent with this inquiry, a citizen's interest in being free from police intrusion is no longer minimal once there is a seizure. When weighing the public's interest, this Court must cautiously apply the community caretaking function exception because of 'a real risk of abuse in allowing even well-intentioned stops to assist.'51 Once the exception does apply, police officers may conduct a noncriminal investigation so long as it is necessary and strictly relevant to performance of the community caretaking function.52 The noncriminal investigation must end when reasons for initiating an encounter are fully dispelled.53

In this case, the first event at 10:10 p.m. was the starting point of a pre-seizure encounter, albeit a brief one. Officers Jennings and Kim observed Petitioner, decided to approach her and then hailed her. Their decision, based on good

intentions, was supported by (1) their perception and erroneous belief that Petitioner was between the ages of 11 and 13; (2) the late hour of 10:10 p.m. on Tuesday, March 3, 1998; (3) her presence in a high narcotics trafficking area on the corner of Third Avenue and Stewart Street in downtown Seattle; and (4) the fact she was in the company of several persons, including one adult male person known by the officers to be associated with narcotics.

The officers testified the encounter was initiated by their concern for Petitioner's safety as a potential youth at risk. The public interest without question comports with increasing the safety of children, especially those considered 'at-risk youth.'54

The record does not support justification for detaining Petitioner under the Family Reconciliation Act55 which clearly is designed to promote the public interest in the safety of children. In addition, rendering aid or assistance through a health and safety check is a hallmark of the community caretaking function exception. Otherwise a police 'officer could be considered derelict by not acting promptly to ascertain if someone needed help.'56 In contrast, Petitioner's interest in freedom from police intrusion was minimal as long as there was no seizure. Balancing the interests indicates the pre-seizure encounter was reasonable and justified under the community caretaking function exception.

TIME	SEQUENCE OF EVENTS
10:10 p.m.	INITIAL OBSERVATION AND DECISION TO APPROACH PETITIONER

Figure 2. Permissible Police Action

Petitioner, however, did not welcome the pre-seizure encounter with police officers. She began to walk away. The officers not then suspecting she had committed a crime, Petitioner should have been able to walk away and terminate the encounter.57 She instead 'was restrained by the officers.'58 This restraint initially might conceivably be considered a continuation of the previous event of observing Petitioner and deciding to approach her. The balancing test nonetheless must be applied again because there was a change in Petitioner's interest in freedom from police intrusion.

The second event the officer grabbing Petitioner by the arm raised the encounter to the level of a 'seizure' without a warrant.59 Her interest in being free from police intrusion was no longer minimal. Officer Jennings testified he 'wanted to find out how old {Petitioner} was . . . and question her why she was downtown, what her purpose was, who she was with, was she with family, was she by herself, does she know these people . . . .'60 When asked her age, Petitioner truthfully told the officers she was 16 years old. Her honest answer was met with momentary disbelief and further police intrusion by demand for identification and proof of age. Officer Jennings testified he would not have released Petitioner even

though she said she was 16 and even if she had said she was not in need of help.

Counterbalancing Petitioner's substantial interest in freedom from police intrusion is the public's interest in the safety of children. When weighing the public's interest, this Court must cautiously apply the community caretaking function exception because of the potential for abuse. The findings of fact indicate the police officers relied upon the following subjective and objective facts: (1) Petitioner's perceived age of between 11 and 13; (2) the late hour beyond 10:10 p.m. on Tuesday, March 3, 1998; (3) her presence in a high narcotics area on the corner of Third Avenue and Stewart Street in downtown Seattle; and (4) the fact she was in the company of a person known by the officers to be associated with narcotics. The actions by the officers were suggestive of enforcement of a juvenile curfew law. But Seattle does not have such a law.

It is at least subject to question whether juvenile curfew laws impermissibly infringe upon a minor's constitutional freedoms of association, expression and movement.61 Consideration of these freedoms in this case, after cautious application of the community caretaking function exception, leads us to conclude the seizure of Petitioner Kinzy by the officers and their actions which followed was unreasonable. Respondent's interest in maintaining the safety of children did not outweigh Petitioner's constitutional interests in freedom of association, expression and movement.

TIME	SEQUENCE OF EVENTS
10:10 p.m.	INITIAL OBSERVATION AND DECISION TO APPROACH PETITIONER
10:10 p.m. plus	OFFICER JENNINGS GRABBED PETITIONER'S ARM AS SHE WALKED AWAY

Figure 3. Impermissible Police Action

When the judicial scales are used to balance the governmental interest against a citizen's privacy interest in freedom from police intrusion and freedoms of association, expression and movement, 'the balance ought to be struck on the side of privacy' because '{t}he policy of the Fourth Amendment is to minimize governmental confrontations with the individual.'62 Respondent State of Washington has argued that striking the balance in favor of Petitioner in this case 'would insulate criminals who prey upon children by involving them in prostitution, sexual exploitation and narcotics trafficking.'63 However, the Fourth Amendment will not foster this parade of horribles so long as police officers have a reasonable, articulable suspicion of criminal activity before undertaking a stop which leads to detention, search and seizure.64

MOTION TO SUPPRESS

'When an unconstitutional search or seizure occurs, all subsequently ncovered evidence becomes fruit of the poisonous tree and must be suppressed.'65 In this case, evidence of cocaine was discovered only after (1) seizure of Petitioner, (2) the pat-down frisk of Petitioner, (3) the seizure of cocaine flecks and (4) Petitioner's admission that she had more cocaine in her 'bra.' Petitioner correctly claims before this Court that her seizure by Respondent was unconstitutional, and thus the subsequently discovered cocaine became the 'fruit of the poisonous tree.' The trial court should have granted Petitioner's motion to suppress.

CONVICTION UNDER RCW 69.50.401(d)

RCW 69.50.401(d) provides:

> It is unlawful for any person to possess a controlled substance unless the Substance was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of his or her professional practice, or except as otherwise authorized by this chapter. Any person who violates this subsection is guilty of a crime, and upon conviction may be imprisoned for not more than five years, fined not more than ten thousand dollars, or both, except as provided for in subsection (e) of this section.

Conviction under RCW 69.50.401(d) requires possession of a 'controlled substance,' which by statutory definition includes cocaine.66 Our decision which concludes Petitioner's motion to suppress evidence of cocaine should have been granted thus eliminates the sole basis for her conviction.

SUMMARY AND CONCLUSION

Under the Fourth Amendment to the United States Constitution, a 'seizure' by police officers without a warrant is per se unreasonable. One exception to the warrant requirement arises when police are serving in their role as community caretakers. The community caretaking function exception may not be used as a pretext for a criminal investigation. It normally applies to police encounters involving emergency aid and routine checks on health and safety.

Where, as in this case, an encounter involves a routine check on health and safety, its reasonableness depends upon a balancing of a citizen's privacy interest in freedom from police intrusion against the public's interest in having police perform a 'community caretaking function.' A person's interest in freedom from police intrusion increases when an encounter is elevated to the level of a 'seizure.' When a person has not been seized, balancing the interests usually favors the action by police. Police officers must be able to approach citizens and permissively inquire whether they will answer questions. This intrusion is minimal and reasonable in light of citizens' expectations that police will assist them in a variety of circumstances.

When a person is seized, however, the intrusion no longer remains minimal. Balancing the interests will not necessarily favor action by police. When in doubt, the balance should be struck on the side of privacy because the policy of the Fourth Amendment is to minimize governmental intrusion into the lives

of citizens. The community caretaking function exception should be cautiously applied because of its potential for abuse. Once the exception does apply, police may conduct a noncriminal investigation so long as it is necessary and strictly relevant to performance of the community caretaking function. The noncriminal investigation must end when reasons for initiating an encounter have been fully dispelled.

In this case, the findings of fact reveal two significant events on March 3, 1998: (1) police observation of Petitioner and the decision to approach her at 10:10 p.m. and (2) Officer Jennings' restraint of Petitioner as she began to walk away.

The first event was the starting point for a pre-seizure encounter, albeit a brief one. Balancing the interests leads to a conclusion that that encounter was reasonable. Petitioner's privacy interest in being free from police intrusion was minimal as long as there was no 'seizure.' Rendering aid or assistance through a health or safety check is a hallmark of the community caretaking function exception. Under the second event, the police officers had no articulable suspicion that Petitioner had committed a criminal offense. She was entitled to walk away and terminate the encounter with the police officers. Petitioner chose to walk away from the two police officers. Officer Jennings grabbed Petitioner by her arm, thus elevating the encounter to a constitutional seizure. After this, Petitioner's privacy interest in being free from police interference was no longer minimal. The officer was no longer permissively inquiring whether

Petitioner would answer questions. Petitioner was compelled to answer questions to the satisfaction of the police officers. Otherwise, they would not have allowed her to leave, even when she answered their questions truthfully. In addition, Respondent's detention of Petitioner was based upon facts which suggested imposition of a juvenile curfew law. Seattle has no such law. Curfew laws have not been favored because of criticism they impermissibly infringe upon a citizen's constitutional freedoms of association, expression and movement. Cautious application of the community caretaking function exception leads to our conclusion that the post-seizure action by the officers against Petitioner was unreasonable. Respondent's interest in protecting the safety of children did not outweigh Petitioner's interest in her constitutional freedoms of association, expression and movement.

The community caretaking function exception did not justify seizure of Petitioner by Respondent. Under these circumstances, this was an unconstitutional seizure which tainted all police activity which followed. The trial court should have granted Petitioner's motion to suppress evidence. With suppression of the cocaine, there would be no evidence to support the charged criminal offense under RCW 69.50.401(d).

We reverse the decision of the Court of Appeals, Division I, which affirmed both the conviction of Petitioner Loreal Monique Kinzy and the order of the King County Superior Court denying her motion to suppress.

1 State v. L.K., 95 Wn. App. 686, 977 P.2d 39 (1999).

2 Id. at 691-95.

3 Clerk's Papers at 1.

4 Report of Proceedings at 3, May 7, 1998.

5 Clerk's Papers at 7; Report of Proceedings at 70-72, May 7, 1998.

6 Petitioner's motion to suppress evidence was denied on May 7, 1998. Respondent then prepared a document captioned 'Written Findings of Fact and Conclusions of Law to Comply with CrR 3.6,' which the trial court signed on July 30, 1998. Respondent filed the document with the King County Superior Court under an erroneous cause number. Because of this error, Respondent filed a motion with this Court to supplement Clerk's Papers with the document. The motion was granted on December 9, 1999.

7 Report of Proceedings at 15-16, 25, 30, May 7, 1998 (emphasis added).

8 Hearings, Findings and Decision on Information, Clerk's Papers at 6; Report of Proceedings at 103, May 7, 1998.

9 Order of Disposition, Clerk's Papers at 9; Report of Proceedings at 28, June 4, 1998; see also RCW 13.40.160(2).

10 Clerk's Papers at 10.

11 State v. L.K., 95 Wn. App. at 697.

12 Br. of Appellant at 18.

13 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

14 State v. L.K., 95 Wn. App. at 694-97.

15 Compare Pet. for Review at 1 with Supplemental Br. of Pet'r at 1-17.

16 Order Granting Discretionary Review.

17 State v. Hill, 123 Wn.2d 641, 647, 870 P.2d 313 (1994).

18 See Supplemental Br. of Pet'r.

19 See State v. Hill, 123 Wn.2d at 644.

20 Findings of Fact and Conclusions of Law to Comply with CrR 3.6, Findings of Fact 1, 2, 8 and 9.

21 Id. Finding of Fact 2.

22 Id. Findings of Fact 2 and 3.

23 Id. Findings of Fact 4, 5, 6 and 7.

24 Id. Findings of Fact 10 and 11.

25 Compare Supplemental Br. of Pet'r with Br. of Appellant at 18-23; State v. L.K., 95 Wn. App. at 695-96.

26 Compare Supplemental Br. of Pet'r with Br. of Appellant at 23-24; State v. L.K., 95 Wn. App. at 697.

27 See Supplemental Br. of Pet'r.

28 Id. at 3 (citing State v. Kennedy, 107 Wn.2d 1, 4, 726 P.2d 445 (1986) and Wong Sun v. United States, 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963)).

29 Id.

30 State v. Houser, 95 Wn.2d 143, 149, 622 P.2d 1218 (1980) (citing Coolidge v. New Hampshire, 403 U.S. 443, 91 S. Ct. 2022, 29 L. Ed. 2d 564 (1971)).

31 Id. (citing Arkansas v. Sanders, 442 U.S. 753, 759, 99 S. Ct. 2586, 61 L. Ed. 2d 235 (1979)) (internal quotations omitted).

32 Id.

33 Petitioner also raised an issue concerning the validity of her seizure under article I, section 7 of the Washington Constitution. Pet. for Review at 1. However, she presented no arguments on this issue other than merely stating: 'This Court has consistently held that article I, sec. 7 of the Washington Constitution is especially protective of an individual's right to privacy.' Supplemental Br. of Pet'r at 2-3 n.2 (citing State v. Parker, 139 Wn.2d 486, 987 P.2d 73 (1999) and State v. Ladson, 138 Wn.2d 343, 356- 57, 979 P.2d 833 (1999)). This Court will not address constitutional issues not supported by adequate briefing. State v. Hill, 123 Wn.2d at 648.

34 Illinois v. Wardlow, 120 S. Ct. 673, 675 (2000).

35 Report of Proceedings at 25, May 7, 1998.

36 413 U.S. 433, 441, 93 S. Ct. 2523, 37 L. Ed. 2d 706 (1973) (emphasis added).

37 See State v. Houser, 95 Wn.2d at 151.

38 Id. at 151. While countenancing the community caretaking function exception announced in Cady, this Court has not explicitly stated the exception applies to article I, section 7 of the Washington Constitution.
Cf. State v. Ladson, 138 Wn.2d at 356-57 (characterizing State v. Houser as 'an article I, section 7, case' which 'explained that the police may validly exercise the community caretaking function of removing an abandoned vehicle but may not use that authority as a pretext to conduct unrelated

criminal investigation.'). In Ladson, this Court correctly explained the holding of State v. Houser, but somewhat mischaracterized it as 'an article I, section 7, case.' In Houser, all citations concerning the community caretaking function exception refer to federal cases interpreting the Fourth Amendment to the United States Constitution and not to article I, section 7 of the Washington Constitution.

39 See, e.g., State v. Loewen, 97 Wn.2d 562, 567-68, 647 P.2d 489 (1982); State v. Angelos, 86 Wn. App. 253, 255-56, 936 P.2d 52 (1997) (Division I), review denied, 133 Wn.2d 1034, 950 P.2d 478 (1998). The emergency aid doctrine is different from the 'exigent circumstances' exception to the warrant requirement. Both involve situations in which police officers must act immediately, but for distinctly different purposes. Unlike the exigent circumstances exception, 'the emergency {aid} doctrine does not involve officers investigating a crime but arises from a police officer's community caretaking responsibility to come to the aid of persons believed to be in danger of death or physical harm.' State v. Leupp, 96 Wn. App. 324, 330, 980 P.2d 765 (1999) (Division II).

40 See, e.g., State v. Villarreal, 97 Wn. App. 636, 643-44, 984 P.2d 1064 (1999) (Division III) (community caretaking function exception applied to stop and identification inquiry of defendant found urinating in public).

41 State v. Hutchison, 56 Wn. App. 863, 865, 785 P.2d 1154 (1990) (Division II).

42 Mary Elisabeth Naumann, Note, The Community Caretaker Doctrine: Yet Another Fourth Amendment Exception, 26 AM. J. CRIM. L. 325, 333-34 (1999); compare State v. Dempsey, 88 Wn. App. 918, 947 P.2d 265 (1997) (Division III) (search did not exceed scope of emergency involuntary civil commitment) with State v. Villarreal, 97 Wn. App. at 643-44.

43 State v. Menz, 75 Wn. App. 351, 354, 880 P.2d 48 (1994) (Division II), review denied, 125 Wn.2d 1021, 890 P.2d 463 (1995).

44 133 Wn.2d 210, 216-17, 943 P.2d 1369 (1997).

45 Id.

46 State v. Markgraf, 59 Wn. App. 509, 512, 798 P.2d 1180 (1990)(Division III).

47 Hudson v. City of Wenatchee, 94 Wn. App. 990, 996, 974 P.2d 342 (1999) (Division III).

48 State v. Nettles, 70 Wn. App. 706, 712, 855 P.2d 699 (1993) (Division I), review denied, 123 Wn.2d 1010, 869 P.2d 1085 (1994) (emphasis added).

49 State v. Thorn, 129 Wn.2d 347, 351-52, 917 P.2d 108 (1996) (citing United States v. Mendenhall, 446 U.S. 544, 100 S. Ct. 1870, 64 L. Ed. 2d 497 (1980)).

50 Id. at 352 (citing Florida v. Bostick, 501 U.S. 429, 436, 111 S. Ct. 2382, 115 L. Ed. 2d 389 (1991)).

51 State v. DeArman, 54 Wn. App. 621, 626, 774 P.2d 1247 (1989) (Division I) (citing United States v. Dunbar, 470 F. Supp. 704, 708 (D. Conn. 1979), aff'd, 610 F.2d 807 (2d Cir. 1979)); State v. Hutchison, 56 Wn. App. at 866 (Division II).

52 See State v. Gleason, 70 Wn. App. 13, 17-18, 851 P.2d 731 (1993) (Division III); State v. Markgraf, 59 Wn. App. at 513 (Division III) ('The purpose of the stop must be related to an investigation focused on the detainee.').

53 State v. DeArman, 54 Wn. App. at 626-27 (Division I); see State v. Houser, 95 Wn.2d at 155 ('As a further protection against abuse, the scope of the search should be limited to those areas necessary to fulfill its purpose.').

54 RCW 13.32A.010. "At-risk youth' means a juvenile: (a) Who is absent from home for at least seventy-two consecutive hours without consent of his or her parent; (b) Who is beyond the control of his or her parents such that the child's behavior endangers the health, safety, or welfare of the child or any other person; or (c) Who has a substance abuse problem for which there are no pending criminal charges related to the substance abuse.' RCW 13.32A.030(2). A child is an 'unemancipated individual who is under the chronological age of eighteen years.' RCW 13.32A.030(3).

55 Chapter 13.32A RCW

56 State v. Gocken, 71 Wn. App. 267, 276, 857 P.2d 1074 (1993) (Division I), review denied, 123 Wn.2d 1024, 875 P.2d 635 (1994).

57 See State v. Thorn, 129 Wn.2d at 352; see also State v. Menneger, 114 Wn.2d 304, 313, 787 P.2d 1347 (1990) ('When the officer asked the passenger for his driver's license, the passenger

was free to refuse. He also was free to refuse the invitation to drive his intoxicated companion's vehicle.').

58 Written Findings of Fact and Conclusions of Law to Comply with CrR 3.6 at 1-2.

59 See State v. L.K., 95 Wn. App. at 691.

60 Report of Proceedings at 16, May 7, 1998.

61 See State v. Pullman, 82 Wn.2d 794, 795 n.1, 514 P.2d 1059 (1973); See State v. J. D., 86 Wn. App. 501, 511, 937 P.2d 630 (1997), review granted, 134 Wn.2d 1006, 954 P.2d 277 (1998). This Court initially granted review but then dismissed it as improvidently granted on May 12, 1998.

62 Id.

63 State v. L.K., 95 Wn. App. at 695.

64 See Terry v. Ohio, 392 U.S. at 30.

65 State v. Ladson, 138 Wn.2d at 359.

66 RCW 69.50.101(d) (defining 'controlled substance' as 'a drug, substance, or immediate precursor included in Schedules I through V as set forth in federal or state laws, or federal or board rules'); RCW 69.50.206(b)(5) (listing '{m}ethylbenzoylecgonine (cocaine--its salts, optical isomers, and salts of optical isomers)' under Schedule II).

MADSEN, J. (concurring) -- I agree with the majority that the seizure here was an unlawful detention. I also agree with Judge Baker's dissent that applying the community caretaking exception in this case would expand the exception far beyond it limits. State v. L.K., 95 Wn. App. 686, 697, 977 P.2d 39 (1999) (Baker, J., dissenting). Moreover, because this exception defies precise definition, its potential for abuse is high.

The police were justified in their initial contact with L.K. if they were legitimately attempting to determine if she was in need of assistance, but once they determined that she was not, their contact should have ended. The community caretaking

function exception serves as a vehicle allowing police to check on persons who appear to be in need of aid. She did not appear to be in distress or in need of medical aid, and, despite her proximity to an area where drug trafficking occurred and to an individual with a history of drug involvement, there was no evidence of any drug activity at the time the police approached. See, e.g., State v. Hutchison, 56 Wn. App. 863, 867, 785 P.2d 1154 (1990) (police properly searched for the identification of a man they found passed out in a parking lot); Gallegos v. City of Colorado Springs, 114 F.3d 1024, 1029 n.4 (10th Cir. 1997) (police properly stopped a distraught man who was crying, smelled of alcohol, and had his hands over his face as he walked down a street late at night).

Also, although I agree that the community caretaking function is a valid exception, the majority unfortunately states that abuse of the exception will not occur 'so long as police officers have a reasonable, articulable suspicion of criminal activity before undertaking a stop which leads to detention search, and arrest.' Majority at 23. If the exception for community caretaking applies in a given case, it will allow the police to check on those appearing to be in need of aid without meeting the standards for a Terry stop. Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). In some cases, carrying out the community caretaking function will lead to detention, search, and arrest, such as in Hutchison, where the search for identification led to the discovery of controlled substances.

I concur in the majority.

TALMADGE, J. (dissenting) -- I dissent because the majority turns every encounter between the police and the public into a latent criminal investigation, thereby doing untold damage to law enforcement's traditional community caretaking function. As the majority would have it, police can no longer detain children at risk, runaways, mentally ill and intoxicated persons, and others in distress unless they have a warrant. Requiring a warrant before a person may be detained by police officers exercising their community caretaking responsibilities will have an immediate and devastating effect upon a variety of essential law enforcement functions necessary to preserve the social order and to aid those in harm's way. If no warrant can be obtained absent probable cause criminal activity occurred, police community caretaking will simply disappear except in those fortuitous instances when criminal activity actually coincides with the need for community caretaking.

Modern law enforcement is not confined to criminal investigation. Police officers have numerous civil functions unrelated to criminal investigations, ranging from serving civil warrants to picking up runaway children to detaining mentally ill or intoxicated people for appropriate treatment. In fact, ' 'Most police work involves noncriminal events. Order maintenance or peacekeeping activities comprise an estimated two-thirds of all

calls to the police{.}' ' Samuel Walker, The Police in America 112 (McGraw Hill 2d ed. 1992), quoted in Debra Livingston, Police Community Caretaking, and the Fourth Amendment, 1998 U. Chi. Legal F. 261, 263 n.9. Professor LaFave made this point well when he wrote:

The policeman, as a jack-of-all-emergencies has 'complex and multiple tasks to perform in addition to identifying and apprehending persons committing serious criminal offenses'; by default or design he is expected to 'aid individuals who are in danger of physical harm,' 'assist those who cannot care for themselves,' and 'to provide other services on an emergency basis.' If a reasonable and good faith search is made of a person for such a purpose, then the better view is that evidence of crime

3 Wayne R. LaFave, Search and Seizure sec. 5.4(c), at 163 (3d ed. 1996) (footnote omitted). Another commentator wrote:

Communities have always looked to police to perform social services unrelated or at best partially related to enforcing criminal law. 'Community caretaking' denotes a wide range of everyday police activities undertaken to aid those in danger of physical harm, to preserve property, or 'to create and maintain a feeling of security in the community.' It includes things like the mediation of noise disputes, the response to complaints about stray and injured animals, and the provision of assistance to the ill or injured. Police must frequently 'care for those who cannot care for themselves: the destitute, the inebriated, the addicted . . . and the very young.' They are often charged with taking lost property into their possession; they not infrequently see to the removal of abandoned property. In those place where social disorganization is at its highest, police are even called upon 'to serve as surrogate parent or other relative, and to fill in for social w orkers, housing inspectors, attorneys, physicians, and psychiatrists.' Community caretaking, then, is an essential part of the functioning of local police. It in fact occupies such a high

proportion of police time that one can even question 'the value of viewing the police primarily as a part of the criminal justice system.'

Livingston, supra, at 271-72 (footnotes omitted).

The United States Supreme Court in Cady v. Dombrowski, 413 U.S. 433, 93 S. Ct. 2523, 37 L. Ed. 2d 706 (1973), first described the broad array of noncriminal, noninvestigative police duties as 'community caretaking functions.' In Cady, the Court noted: 'Local police officers, unlike federal officers, frequently investigate vehicle accidents in which there is no claim of criminal liability and engage in what, for want of a better term, may be described as community caretaking functions, totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute.' Cady, 413 U.S. at 441.

The community caretaker function is a social responsibility demanded by communities of their police officers. People want police to assist at traffic accidents, handle emergencies, aid people in distress, and generally render assistance when needed. The law does not require a warrant for such activities unless the police intend a search or an arrest, and community caretaking functions, by definition, do not fit into either category.1 A criminal investigative purpose usually arises only by happenstance in these police-community contacts -- officers discover criminal conduct or contraband while providing service to the public. Of course, officers acting in their community caretaker role may not do so as

a pretext for criminal investigation; should they use their community caretaking responsibilities as a pretext for a criminal investigation, any evidence so developed should be inadmissible. See State v. DeArman, 54 Wn. App. 621, 774 P.2d 1247 (1989); State v. Markgraf, 59 Wn. App. 509, 798 P.2d 1180 (1990).

Washington courts have long discussed the noncriminal, noninvestigative duties of law enforcement. Our cases may be properly divided into four distinct categories:2 (1) those dealing with medical or other types of emergencies; (2) those dealing with automobile impoundments or inventories; (3) those dealing with a law enforcement officer's role as a preserver of public safety; and (4) those dealing with a statutory mandate requiring an officer's intervention. Washington case law on the community caretaking function of law enforcement officers is broad, as befits a flexible concept rooted in police officers' traditional community service role.

The very first Washington case to use the term 'community caretaking' is instructive. In State v. Lund, 10 Wn. App. 709, 519 P.2d 1325 (1974), police stopped Lund's vehicle because it was making excessive noise. They discovered Lund was driving while his license was suspended and arrested him. While Lund was being patted down, he told police there was a loaded gun in his vehicle. The police decided to retrieve the gun for safekeeping because the car was parked along a street traversed by school children and the car could not be safely locked. In retrieving the gun from the car, the police discovered a canister of marijuana,

which they seized and was later admitted into evidence. On appeal, Lund challenged the legality of the search of his car.

The Court of Appeals relied on the community caretaking doctrine in holding the search was legal. Because it was within the public safety function of the police to remove the gun from the vehicle, and since they were performing a lawful function when they discovered the marijuana, the marijuana was properly admitted into evidence at Lund's trial. Id. at 712.3 This case fits into either the vehicle impoundment/inventory category or the public safety category of the community caretaking doctrine.

In a subsequent case, the Court of Appeals held an inventory search of a car reasonably impounded comes under the community caretaking doctrine, stating:

> Such warrantless inventory searches, when not intended to discover evidence of a crime, have been justified by the 'benign purposes' of protection of public safety, protection of the driver's property, protection of the police from danger or from liability for claimed thefts, or protection of temporary storage bailees against false charges.

State v. Hardman, 17 Wn. App. 910, 912, 567 P.2d 238 (1977) (citing South Dakota v. Opperman, 428 U.S. 364, 367, 96 S. Ct. 3092, 49 L. Ed. 2d 1000 (1976)), review denied, 89 Wn.2d 1020 (1978).4

In State v. Chisholm, 39 Wn. App. 864, 696 P.2d 41 (1985), officers stopped a vehicle to warn defendant his hat was in jeopardy of blowing out of the bed of his pickup truck. When one officer approached the cab of the truck, he noticed an open can of beer between the driver and passenger. Knowing both driver and

passenger to be minors, the officer arrested them, and in the search incident to arrest, discovered marijuana. The trial court suppressed the evidence of marijuana, holding the stop of the truck was improper because there was no evidence of criminal activity. The Court of Appeals reversed in a well-reasoned opinion by Judge Reed that is worth quoting at length:

First, we note that a vehicle stop, even for a benign purpose, must be made in harmony with the Fourth Amendment proscription against unreasonable searches and seizures. Delaware v. Prouse, 440 U.S. 648, 59 L. Ed. 2d 660, 99 S. Ct. 1391 (1979). Whether a given stop is unreasonable 'depends on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers.' United States v. Brignoni-Ponce, 422 U.S. 873, 878, 45 L. Ed. 2d 607, 95 S. Ct. 2574 (1975). See also Camara v. Municipal Court, 387 U.S. 523, 18 L. Ed. 2d 930, 87 S. Ct. 1727 (1967).

Ordinarily, the balance between public and individual interests is accurately measured by the presence or absence of 'probable cause.' On occasion, the less demanding 'reasonable suspicion' standard is employed. Here, the trial court concluded that the absence of reasonable suspicion to believe criminal activity was afoot rendered the stop unlawful. We disagree. Neither 'probable cause' nor 'reasonable suspicion' is an appropriate yardstick where the stop was made for noncriminal, noninvestigatory purposes. In that context, whether a particular stop is reasonable depends not on the presence or absence of 'probable cause' or 'reasonable suspicion,' but rather on a balancing of the competing interests involved in light of all the surrounding facts and circumstances. See South Dakota v. Opperman, 428 U.S. 364, 49 L. Ed. 2d 1000, 96 S. Ct. 3092 (1976). Here, an individual's interest in proceeding about his business unfettered by police interference must be balanced against the public's interest in having police officers perform services in addition to

the traditional enforcement of penal and regulatory laws. United States v. Dunbar, 470 F. Supp. 704 (D. Conn.), aff'd, 610 F.2d 807 (2d Cir. 1979). This latter interest is sometimes characterized as 'community caretaking functions.' Cady v. Dombrowski, 413 U.S. 433, 441, 37 L. Ed. 2d 706, 93 S. Ct. 2523 (1973).

One might argue that permitting police officers to make stops without 'probable cause' or at least 'reasonable suspicion' is so fraught with the potential for abuse that a blanket proscription is necessary. We believe that such an approach is an unnecessarily harsh remedy in light of the safeguards offered by a suppression hearing. We trust that the trial judge will discern a legitimate stop from one based on subterfuge.{5} Accordingly, we hold that, in appropriate circumstances, a police officer may stop a vehicle momentarily to warn the occupants that an item of their property is endangered. Such a momentary seizure, being 'reasonable,' does not require the suppression of contraband or other evidence of crime thereafter discovered merely because the officer lacked probable cause or reasonable suspicion to believe the vehicle's occupants were involved in criminal activity.

Id. at 866-67 (footnotes omitted). The Chisholm court noted some examples of the community caretaking function in areas not dealing with automobiles: 'Many communities look to their officers to assist citizens or render aid under a variety of circumstances. For example, officers often deliver emergency messages, give directions, search for lost children, assist stranded motorists and render first aid.' Id. at 867 n.3.

In State v. Hutchison, 56 Wn. App. 863, 785 P.2d 1154 (1990), police encountered Hutchison lying unconscious on his back in a parking lot and searched his person for identification and information on his condition. In the course of the search, the officer discovered a controlled substance. Hutchison was charged with two counts of possession of a controlled substance with intent

to deliver. At the pretrial suppression hearing, the trial court suppressed the evidence on the ground no medical emergency or exigent circumstances existed to justify the warrantless search. The Court of Appeals reversed, saying:

> It has been recognized and accepted in numerous federal and state court decisions that police officers modernly are expected to render aid and assistance on a regular basis to persons who, although perhaps not in need of immediate professional medical treatment, are in danger and in need of help. Searches performed as a part of providing such aid, if reasonable and in good faith, are generally allowed.
>
> . . . .
>
> In this instance, it is undisputed that at the time of the search, Hutchison was in need of aid and assistance. Officer Blair had a reasonable and legitimate concern that Hutchison would be in danger if abandoned in the parking lot. The trial court found that the officer did not search Hutchison for criminal investigatory purposes but in an effort to determine what should be done with him.

Id. at 865, 867.6 This case fits neatly into the public safety category of the community caretaking doctrine.

State v. Menz, 75 Wn. App. 351, 880 P.2d 48 (1994), review denied, 125 Wn.2d 1021, 890 P.2d 463 (1995), is a more recent example of the public safety category. Police responded to an anonymous domestic violence call. When they reached the residence, they found the front door open five or six inches. The lights were on and a television was playing, but no one responded to their knocks and announcements of their presence. Concerned for the safety of the occupants, they entered the house and began searching for persons that might be hiding or

incapable of responding. Entering a bedroom, they discovered marijuana plants. They left, obtained a search warrant, and returned to seize the plants.

At the suppression hearing, Menz argued the warrantless search of his home was illegal. The trial court denied the motion to suppress, and the Court of Appeals affirmed, employing the public safety branch of the community caretaking doctrine as justification for the search:

{T}he police in this case were told that domestic violence was occurring. They had reason to believe people were home because the front door was open on a winter night, the lights were on, and the TV was playing. Yet they could not get anyone to answer the front door. As we have already explained, these circumstances generated a reasonable concern for the well-being of the home's occupants{.}

Id. at 355.

We, too, have long recognized officers may detain individuals without a warrant if one of the categories of community caretaking is involved. See State v. Loewen, 97 Wn.2d 562, 647 P.2d 489 (1982) (search of auto accident victims for identification); State v. Jordan, 79 Wn.2d 480, 487 P.2d 617 (1971) (warrantless entry of motel room to examine defendant at request of motel maid where defendant appeared gray and unmoving on bed). These cases fit into the medical emergency category of the community caretaking doctrine.

We have also expressly recognized the public safety category of the community caretaker doctrine. In State v. Mennegar, 114 Wn.2d 304, 787 P.2d 1347 (1990), officers arrested a person for driving under the influence and impounded his vehicle. They determined a passenger could drive the vehicle and checked the passenger's driver's license, revealing an outstanding arrest warrant. In a search incident to arrest on the warrant, the officers found drugs. We said:

> The question then becomes whether it was reasonable and legal for the officer to request the passenger's driver's license and check to insure that the license was valid before turning the intoxicated driver's vehicle over to the passenger. Whether such an encounter, made for noncriminal noninvestigatory purposes, is reasonable depends upon a balancing of the individual's interest in freedom from police interference against the public's interest in having the police perform a 'community caretaking function'.

Id. at 313. We unanimously upheld the officers' actions as an aspect of the community caretaker function and reversed the trial court's suppression of the evidence. More recently, in Kalmas v. Wagner, 133 Wn.2d 210, 943 P.2d 1369 (1997), we considered a federal civil rights violation claim against two deputy sheriffs who entered a tenant's premises at tenant's request as part of a landlord-tenant dispute. Citing Mennegar, we reiterated the rule: 'Whether an encounter made for noncriminal noninvestigatory purposes is reasonable depends on a balancing of the individual's interest in freedom from police interference against the public's interest in having the police perform a 'community caretaking

function.'' Kalmas, 133 Wn.2d at 216-17 (holding there was no unreasonable search because the tenant had invited the deputies into the residence). In Mennegar and Kalmas, we explicitly adopted the balancing rule set forth in Chisholm: '{A}n individual's interest in proceeding about his business unfettered by police interference must be balanced against the public's interest in having police officers perform services in addition to the traditional enforcement of penal and regulatory laws.' Chisholm, 39 Wn. App. at 867 (footnote omitted) (citing United States v. Brignoni-Ponce, 422 U.S. 873, 878, 95 S. Ct. 2574, 45 L. Ed. 2d 607 (1975)).

The present case involves the fourth category of the community caretaking function: interactions between law enforcement and citizens mandated by statute. Arguably, such statutes express a strong public interest in law enforcement action. We have not confronted this aspect of community caretaking by law enforcement, but in State v. Dempsey, 88 Wn. App. 918, 947 P.2d 265 (1997), the Court of Appeals addressed just such a situation. Dempsey's parents called the police after Dempsey threatened them and they feared for their safety. An officer who responded to the call found Dempsey to be paranoid, verbally abusive, and physically aggressive. The officer had to prevent Dempsey from assaulting his father in the officer's presence. Id. at 921. The officer decided to take Dempsey to a medical center for a mental health evaluation pursuant to RCW 71.05.150(4)(b).7 The officer performed a search of Dempsey before putting him into his patrol car and discovered a large

folding knife and a bindle containing what was later identified as methamphetamine. He arrested Dempsey, who was convicted after the trial court denied his motion to suppress the methamphetamine evidence.

On appeal, Dempsey argued his detention was pretextual. Dempsey, 88 Wn. App. at 922. The Court of Appeals held, however, the search was justified:

> The relevant statutory language calls for the reasonable perception of 'a substantial risk that physical harm will be inflicted by an individual upon another, as evidenced by behavior which has caused such harm or which places another person or persons in reasonable fear of sustaining such harm . . . .' former RCW 71.05.020(3)(b) (emphasis added). Once the basis for an involuntary commitment is established, authority for a protective search is implied by statute. Lowrimore, 67 Wn. App. at 956. Evidence discovered in furtherance of a caretaking function is admissible.

Id. at 923. Accord State v. Mason, 56 Wn. App. 93, 782 P.2d 572 (1989) (affirming conviction for possession of controlled substance discovered in a pat-down search of man taken into custody for mental health evaluation), review denied, 114 Wn.2d 1010, 790 P.2d 168 (1990).

Like Dempsey, the present case involves a noncriminal, noninvestigative police action -- the enforcement of a civil statute, the Family Reconciliation Act, chapter 13.32A RCW. The statute sets out a mandatory duty for law enforcement officers to act and the police officers in this case acted pursuant to that statutory mandate. The Act states:

(1) A law enforcement officer shall take a child into custody:

. . . .

(b) If a law enforcement officer reasonably believes, considering the child's age, the location, and the time of day, that a child is in circumstances which constitute a danger to the child's safety or that a child is violating a local curfew ordinance{.}

RCW 13.32A.050(1)(b) (emphasis added).8

The police testified they approached Kinzy in the first place because they were concerned about the possibility she might be in danger. Kinzy's diminutive stature made them think she was younger than her 16 years. She was in an area known for drug dealing and in the company of people the police knew to be involved in the drug culture. Pursuant to the statute, constitute a danger to the child's safety.'9 The statute required them to do that, and further required them to take Kinzy into custody if in fact her safety was in danger. It was in attempting to ascertain Kinzy's circumstances, as the statute required them to do, that the police seized her. The police did not stop Kinzy because of inchoate suspicions of criminal activity. They stopped her because they believed in good faith that an 11-to-13-year-old child on a downtown Seattle street at night in the company of known drug dealers might be at risk pursuant to chapter 13.32A RCW.10

The majority opinion recognizes RCW 13.32A.050 only in passing, ignoring the duty the statute placed on police to act when they believe a child may be at risk. Instead, the majority treats this case as if it were solely a matter of criminal procedure and determines officers may approach a child such as Kinzy but may

not seize her without a warrant. However, the police in this case acted properly under the mandate of the Family Reconciliation Act, legislation designed to assist at-risk children. In the course of their statutory duty under the Act, the officers became reasonably suspicious Kinzy might be in the possession of contraband. She was, in fact, carrying cocaine. Kinzy has not argued the activities of the police leading to the discovery of the cocaine after they seized her were improper. She complains only about the seizure itself.

Although our cases clearly indicate the community caretaking function requires a balancing of the individual's liberty interest with the public's interest in having officers perform noncriminal investigative services, Mennegar, 114 Wn.2d at 313; Kalmas, 133 Wn.2d at 216-17, the majority's formulation of the question in this case dramatically misapplies the balancing test and instead treats the encounter here as a matter of criminal procedure. The question in this case, properly formulated, boils down to this: if the police, in the furtherance of the mandate of RCW 13.32A.050, approach a juvenile, and the juvenile refuses to answer questions and attempts to leave before the police can determine whether the juvenile is 'in circumstances which constitute a danger to the child's safety,' is it reasonable for the police to seize the juvenile, i.e., make it so the juvenile is not free to leave, until they can complete their determination?11 I believe the answer is yes, particularly with regard to children.

'{T}he police are permitted to engage persons in conversation and ask for identification even in the absence of an articulable

suspicion of wrongdoing.' State v. Young, 135 Wn.2d 498, 511, 957 P.2d 681 (1998). Moreover, 'a police officer's conduct in engaging a defendant in conversation in a public place and asking for identification does not, alone, raise the encounter to an investigative detention.' State v. Armenta, 134 Wn.2d 1, 11, 948 P.2d 1280 (1997). Thus, there was nothing wrong with the police officers' initial approach to Kinzy.

We have held in the case of adults, one is free to disengage from a social contact with police, or simply to walk away from the scene if the police seek to engage. See State v. Mendez, 137 Wn.2d 208, 970 P.2d 722 (1999). Here, however, the police restrained Kinzy from walking away. They did so pursuant to their statutory duty to ascertain whether her safety was in danger.

The police acted in accordance with the statutory mandate here. It is only happenstance that the officers found Kinzy was involved in criminal activity. Pursuant to their statutory duty under the Act, officers are usually obliged to transport a child to the child's home or a crisis residential center and advise the child of the reasons for detention. RCW 13.32A.060(1).12 If they legally could have done that, they certainly could have detained her briefly on the street to further their determination of whether she was at risk.

That the police acted pursuant to the at-risk children statute apparently makes no difference to the majority.13 It appears the majority would require a warrant for any detention, even for the reasons set forth in RCW 13.32A.050 or .060 for the child's protection. As noted above, however, the police could not have

obtained a warrant because they had no probable cause to suspect criminal activity when they first detained Kinzy.

Under the majority's formulation, officers could approach a 10-year-old runaway dressed like Jodie Foster in the film 'Taxi Driver' and inquireif she were in danger. If she were to say no, the officers could do no more. According to the majority opinion, if the officers wanted to detain her, they would need to somehow obtain a warrant. In the majority's view, even young age does not appear to be a sufficient factor, even coupled with compelling circumstances, to justify detaining the juvenile in order to ascertain if he or she is in danger. It is difficult to discern how, in the real world, the runaway youth, the uncooperative tuberculosis patient, or the mentally ill person would conveniently stay in place while the officers got the warrant, assuming a warrant is even available.14

The majority opinion leads inevitably to one of the following results: (1) stops or detentions under civil statutes like those involving children at risk, alcoholics, the sick, or the mentally ill are forbidden unless they meet the constitutional standards for criminal matters; or (2) any evidence of a crime discovered in the legitimate furtherance of civil statutes must be suppressed. The first alternative eviscerates statutes designed to aid the most helpless and vulnerable members of society. The second alternative eviscerates the 'plain view' or 'open view' doctrine. Neither alternative can be correct. The practical effect of the majority's unprecedented analysis is that police

officers have no authority to detain a person no matter how compelling or dangerous the circumstances of the person's situation, absent a warrant issued pursuant to criminal procedure.

It is curious this issue should arise today, because these questions were settled at common law hundreds of years ago: 'The authority to restrain a dangerously insane person also appears to have existed at common law{.}' Plancich v. Williamson, 57 Wn.2d 367, 369, 357 P.2d 693, 92 A.L.R.2d 559 (1960) (citing 1909 Vermont case). Nor did our judicial ancestors lack our modern, refined sensibilities regarding the countervailing liberty interests of detained mentally impaired persons. In an 1871 case in which the complaint was for 'unlawful arrest' by a deputy constable of a person alleged to have been insane, incapable of taking care of himself, and conducting himself in a wild and irrational manner, the Massachusetts Supreme Judicial Court said:

> The right which every citizen has to enjoy personal liberty is necessarily subject to some exceptions. . . . Among them, are the right to restrain a person who . . . has fallen in a fit, or is so sick as to be helpless, or is unconsciously going into great danger, or is drunk, or has delirium tremens, or is so insane as to be dangerous to himself or others. In such cases, the right to restrain persons has its foundation in a reasonable necessity, and ceases with the necessity.

Look v. Dean, 108 Mass. 116, 120 (1871). Similarly, our Legislature, out of understandable and laudable concern for children at risk, mandated investigation and action by police in circumstances like those in the present case.

The majority dramatically diminishes law enforcement's community caretaker role generally, and specifically renders unenforceable chapter 13.32A RCW and similar civil statutes authorizing detention of individuals in distress. I decline to analyze every encounter between police and citizens as a proto-criminal investigation to be interpreted under our rules for criminal procedure. I decline to vitiate statutes designed to safeguard the vulnerable. I respectfully dissent.

1 The majority makes no mention of how, if ever, the officers in this case could have procured a warrant if they had no probable cause to believe a criminal violation was taking place. As Professor Livingston says: {T}he probable-cause-and-warrant framework is often plainly inapposite to consideration of the reasonableness of community caretaking intrusions . .

. .

In many community caretaking contexts, however, the relevant question is not whether police have an adequate basis to believe they will find particular persons or things in a particular place. Instead, the question is whether they have sufficient reason to act. Thus, when police enter commercial premises inexplicably left open at night in order to secure the property, they are not looking for specific persons or things. They are performing an historically- anchored 'watchman's' role. Lacking probable cause to search, however, or the ability to satisfy the particular description requirement of the Warrant Clause, police could not obtain a traditional judicial warrant to support their entry even if they sought one in advance.

Livingston, supra, at 274-75.

2 See generally, Mary Elizabeth Naumann, The Community Caretaker Doctrine: Yet Another Fourth Amendment Exception, 26 Am. J. Crim. L. 330 (1999).

3 This search appears to have been equally justifiable as a search incident to arrest, but the Court of Appeals did not discuss it.

4 At one time, the Court of Appeals actually limited the community caretaking doctrine to automobiles. See, e.g., State v. Grundy, 25 Wn. App. 411, 417, 607 P.2d 1235 (1980), review denied, 95 Wn.2d 1008 (1981). This is no longer true.

5 The trial court made precisely that determination in the case at bar.

6 The Division Two panel in this case consisted of three pro tempore judges: retired Superior Court Judge Schumacher, who wrote the opinion, and Justices Pearson and Utter.

7 The statute provides:

A peace officer may, without prior notice of the proceedings provided for in subsection (1) of this section, take or cause such person to be taken into custody and immediately delivered to an evaluation and treatment facility or the emergency department of a local hospital:

(1) . . . .

(b) When he or she has reasonable cause to believe that such person is suffering from a mental disorder and presents an imminent likelihood of serious harm or is in imminent danger because of being gravely disabled.

8 Many courts have addressed the special status of juveniles and the need for special laws to protect them. In a frequently cited case, the United States Supreme Court said:

The state's authority over children's activities is broader than over like actions of adults. This is peculiarly true of public activities and in matters of employment. A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens, with all that implies. It may secure this against impeding restraints and dangers, within a broad range of selection. Among evils most appropriate for such action are the crippling effects of child employment, more especially in public places, and the possible harms arising from other activities subject to all the diverse influences of the street. It is too late now to doubt that legislation appropriately designed to reach such evils is within the state's police power, whether against the parents claim to control of the child or one that religious scruples dictate contrary action.

Prince v. Massachusetts, 321 U.S. 158, 168-69, 64 S. Ct. 438, 88 L. Ed. 645 (1944) (footnote omitted) (upholding state statute forbidding juveniles to sell magazines on streets or public places

and penalizing adults who furnish such publications for sale). The Family Reconciliation Act is a reflection of the concerns and policies the Supreme Court expressed in Prince.

9 The majority appears to be somewhat skeptical about the officers' reasons for approaching Kinzy, but the trial court found the officers' accounts of their activities to be entirely credible and not motivated by pretext. Kinzy does not appeal the trial court's findings on this account, and they are therefore verities.

10 Justice Madsen states in her concurrence: '{Kinzy} did not appear to be in distress or in need of medical aid.' Concurrence at 1. Justice Madsen evidently believes those are the only justifications for the police to have contacted Kinzy, short of probable cause to believe she had committed a crime. Like the majority, Justice Madsen ignores the at-risk children's statute, which requires police to take a child into custody if the officer reasonably believes the child is in circumstances 'which constitute a danger to the child's safety.' RCW 13.32A.050(1)(b). Justice Madsen also states in her concurrence: 'The police were justified in their initial contact with {Kinzy} if they were legitimately attempting to determine if she was in need of assistance, but once they determined that she was not, their contact should have ended.' Concurrence at 1 (emphasis added). The police never reached a determination about whether Kinzy was an at-risk child. There is no finding of fact to that effect, and the testimony of the police quoted in the majority opinion is to the contrary. Had the police actually decided Kinzy was not at-risk and then proceeded with a search anyway, such a search would have been prohibited. But that is not what happened.

11 Although this case addresses only the rights of juveniles under the Family Reconciliation Act, the majority's treatment raises significant implications for all community caretaking functions, including the fourth category relating to civil statutes involving involuntary stops and detentions. See RCW 71.05.150 (detention of mentally disordered persons for evaluation and treatment); RCW 70.96A.140 (involuntary commitment of alcoholics and minors incapacitated by alcoholism or drug addiction); RCW 71.34.040 (temporary involuntary detention of minor for evaluation of need for mental health services); RCW 70.28.031 (providing for involuntary detention, testing, treatment and quarantine of tuberculosis patients).

12 The officers' statutory obligations are explicit and extensive:

(2) Law enforcement custody shall not extend beyond the amount of time reasonably necessary to transport the child to a destination authorized by law and to place the child at that destination. Law enforcement custody continues until the law enforcement officer transfers the custody to a person, agency, or other authorized entity under this chapter, or releases the child because no placement is available. Transfer of custody is not complete unless the person, agency, or entity to whom the child is released agrees to accept custody.

(3) If a law enforcement officer takes a child into custody pursuant to either subsection (1)(a) or (b) of this section and transports the child to a crisis residential center, the officer shall, within twenty-four hours of delivering the child to the center, provide to the center a written report detailing the reasons the officer took the child into custody. The center shall provide the department with a copy of the officer's report.

(4) If the law enforcement officer who initially takes the juvenile into custody or the staff of the crisis residential center have reasonable cause to believe that the child is absent from home because he or she is abused or neglected, a report shall be made immediately to the department.

(5) Nothing in this section affects the authority of any political subdivision to make regulations concerning the conduct of minors in public places by ordinance or other local law.

(6) If a law enforcement officer receives a report that causes the officer to have reasonable suspicion that a child is being harbored under RCW 13.32A.080 or for other reasons has a reasonable suspicion that a child is being harbored under RCW 13.32A.080, the officer shall remove the child from the custody of the person harboring the child and shall transport the child to one of the locations specified in RCW 13.32A.060. RCW 13.32A.050(2) through (6).

13 Serious questions about dereliction of duty would have arisen had the officers let Kinzy walk away simply because that is what she wanted to do. As Judge Agid put it:

When an officer believes in good faith that someone's health or safety may be endangered, particularly if that person is known to have physical or mental problems, public policy does not demand that the officer delay any attempt to determine if assistance is

needed and offer that assistance while a warrant is obtained. To the contrary, the officer could be considered derelict by not acting promptly to ascertain if someone needed help.
State v. Gocken, 71 Wn. App. 267, 276, 857 P.2d 1074 (1993) (upholding warrantless search when police were summoned by a relative fearful of elderly aunt's health), review denied, 123 Wn.2d 1024, 875 P.2d 635 (1994). The same reasoning applies to situations in which children may be at risk.

14 This is not an idle concern. Consider the circumstance in a case we decided last year:
McClenahan had returned to his mother's Lynnwood house after extensive travel, appearing disheveled, having lost all of his clothing during his journeys. At his mother's home, McClenahan engaged in imaginary conversations and advised his mother that people were out to get him, monitoring him via satellites and radio waves. McClenahan's mother finally locked him out of her house until he agreed to take his medications. In response, McClenahan stood outside in the rain for hours and finally climbed onto the roof of his mother's house, where he began running around, striking the skylight, and screaming. McClenahan's mother phoned the local police.
In re Detention of A.S., 138 Wn.2d 898, 905-06, 982 P.2d 1156 (1999). Here, the police responded to the call of McClenahan's distraught mother on a matter that had no criminal overtones. The police took McClenahan into custody pursuant to chapter 71.05 RCW, the involuntary civil commitment act. If a search of McClenahan incident to his being taken into custody had revealed contraband, he might have been charged criminally. Under the majority's rule in this case, that evidence would have to be suppressed because the police had no warrant to seize him in the first place. What would the majority have the police do in such cases? They could not have obtained a warrant because when they observed McClenahan running around on the roof of his mother's house striking the skylight and screaming, they had no probable cause to believe any criminal activity was afoot. If they had called up to McClenahan and asked him to come down, and he said in response, 'Go away and leave me alone; I am just fine,' should the police have simply departed after telling Mrs. McClenahan to have a nice day? That is the result the majority opinion demands.

ORIGINAL

Supreme Court, U.S.
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NO. 00-679

IN THE SUPREME COURT OF THE UNITED STATES

STATE OF WASHINGTON,

Petitioner,

vs.

LOREAL KINZY,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Washington

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MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

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Attorney for Respondent

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39 pp

On behalf of the respondent, Loreal Kinzy, counsel of record asks leave to file the attached brief in opposition, without prepayment of costs and to proceed *in forma pauperis*. Kinzy has been granted leave to so proceed in the Washington Superior Court, Washington Court of Appeals, and Washington Supreme Court.

Dana M. Nelson, a staff attorney at Nielsen, Broman and Associates, informed me that on November 14, 2000, she mailed to Kinzy at her current address two copies of an affidavit in support of the motion to proceed in forma pauperis, in the form prescribed by Rule 4 of the Federal Rules of Procedure. Nelson further informed me that she spoke with Kinzy by telephone on November 22nd, 2000, and that Kinzy indicated that she had received the affidavit and planned to fill it out appropriately with the proper notarization and have it returned to Nielsen, Broman & Associates in time to mail it with the brief in opposition. For unknown reasons, Kinzy has been unable to do so.

In light of Kinzy's expressed desire to complete the affidavit, I anticipate only a short delay in receiving the document and then forwarding it to the Court.

DATED this 27th day of November, 2000.

Respectfully submitted,

David B. Koch
Counsel of Record
Suite 320, Central Building
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Seattle, WA 98104

NO. 00-679

IN THE SUPREME COURT OF THE UNITED STATES

STATE OF WASHINGTON,

Petitioner,

v.

LOREAL KINZY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE WASHINGTON STATE SUPREME COURT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Did the Washington Supreme Court correctly conclude that Respondent's Fourth Amendment rights were violated when she was seized by police as she was walking on the sidewalk of a major downtown Seattle street at 10:00 p.m. on a weeknight, where police claimed they stopped her out of concern for her safety due to her youthful appearance and location in an area known for drugs on a school night, but where she did not appear to be in any distress and the police did not suspect her of any criminal activity?

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OPINIONS BELOW

The Washington Court of Appeals decision affirming Respondent Loreal Kinzy's conviction is reported at State v. L.K., 95 Wn. App. 686, 977 P.2d 39 (1999), and attached as Appendix A. The Washington Supreme Court's decision reversing Kinzy's conviction is reported at State v. Kinzy, 141 Wn.2d 373, 5 P.3d 668 (2000), and attached as Appendix B.

STATEMENT OF THE CASE

At 10:10 p.m. on March 3, 1998, Seattle Police Officers Jennings, Ness and Kim saw Loreal Kinzy walking in downtown Seattle with two other young women and a man. Appendix A, at 2; Appendix B, at 3. The police did not observe any suspicious behavior and did not suspect Kinzy of any criminal activity. Appendix A (dissent), at 1-2; Appendix B, at 6. Although Kinzy and the three others did not appear to be in any distress, the officers decided to stop Kinzy for "her safety" because she had a youthful appearance and was in an area known for drugs at ten o'clock on a school night. Appendix A (dissent), at 2; Appendix B, at 6; Appendix B (concurrence), at 1-2.

Although Kinzy was nearly 17 years old at the time, the officers thought she looked between the ages of 11 and 15. Appendix A (dissent),

at 1. The other three appeared to be in their early twenties. The officers recognized the man from a previous narcotics contact. Appendix B, at 3.

The officers wanted to question Kinzy regarding "why she was downtown, what her purpose was, who she was with, was she with family, was she by herself, does she know these people," etc. Appendix B, at 6. Contrary to petitioner's assertions, the officers never testified that they chose to stop Kinzy "as required by Washington's Family Reconciliation Act." See Petition for Writ of Certiorari, at 3; Appendix A, at 7; Appendix B, at 6.

All three officers approached and directed Kinzy to stop. Although Kinzy's companions stopped, Kinzy continued walking away. The officers subsequently grabbed her arm to stop her from walking. Appendix B, at 5-6. Officer Jennings admitted that by that point, he had become suspicious of criminal activity. Appendix A (dissent), at 2.

Kinzy honestly reported her age to the officers, but the officers did not believe her. Appendix B, at 3, 20. Jennings testified he wanted proof of Kinzy's age and would have continued the detention even if Kinzy had said, "I'm 16, I'm fine, I don't need your help, . . ." Appendix B, at 6-7. Contrary to petitioner's assertions, however, none of the officers testified

that they "sought to verify her identity by checking her name and date of birth in the State database." See Petition for Writ of Certiorari, at 3-4.

During the ensuing seizure, Kinzy repeatedly put her hands into her coat, despite officer requests to keep her hands in view. Claiming safety concerns, Jennings initiated a pat-down search for weapons. After instructing Kinzy to open her coat, Jennings saw what he suspected to be flakes of rock cocaine on the inside of her coat. After the flakes field-tested positive for cocaine, Kinzy admitted she had more cocaine in her bra. Appendix B, at 3.

Kinzy was charged with possessing cocaine. At the fact-finding hearing, Kinzy moved to suppress the cocaine, arguing that it was fruit of an unlawful seizure under the Fourth Amendment. Appendix B, at 2-3. The trial court nevertheless upheld the stop, finding that it was reasonable pursuant to the officers' community caretaking function. Appendix B, at 4. Kinzy was convicted as charged. Appendix B, at 7.

The Washington Court of Appeals affirmed Kinzy's conviction. Writing for the majority, Judge Agid held the stop was justified because there was no evidence it was a pretext, and "the officers were legitimately concerned for the welfare of a young girl who was out late on a school night accompanied by known narcotics users in a high narcotics trafficking

area." Appendix A, at 1. Focusing on the public's interest in preventing children's involvement with drugs, the majority held Loreal's interest in freedom from police interference was outweighed by the public's interest in having the police perform a community caretaking function. Appendix A, at 5-9.

Writing in dissent, Judge Baker would have reversed the trial court's refusal to suppress the evidence. Appendix A (dissent), at 4. The dissent reasoned that the seizure could not be justified as either a Terry[1] stop or a community caretaking stop because the officers observed (1) nothing suspicious and (2) nothing to indicate that Kinzy was "in trouble." Appendix A (dissent), at 2. After reviewing the facts, the dissent pointed out that "[n]o previous case anywhere has held that such factors, or anything close to them, justify the seizure of a citizen." Appendix B (dissent), at 1-2.

In a 5-4 opinion, the Washington Supreme Court reversed, holding that Kinzy's seizure was unreasonable and that the cocaine should have been suppressed as fruit of an unlawful seizure. Writing for the majority, Justice Smith quickly noted that Kinzy's seizure could not be justified under Terry because there was no indication of criminal activity at the time she was seized. Appendix A, at 27-28. The remainder of the majority's opinion

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[1] Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

therefore focused upon whether Kinzy's seizure could be justified under the community caretaking exception. Appendix B, at 13-23.

At the outset of its analysis, the majority recognized that Washington case law had expanded the exception to encompass not only the search and seizure of automobiles, but also to situations involving either emergency aid or routine checks on health and safety. Appendix B, at 13-14. The court noted that the reasonableness of a search or seizure under the emergency aid function depended upon a showing of great urgency. In contrast, the reasonableness of a routine check on safety depended upon balancing the individual's interest in freedom from police interference against the public's interest in having the police perform a community caretaking function. Appendix B, at 14-15.

Before performing the balancing test in Kinzy's case, the majority laid out some general ground rules. First, when an individual has not been seized, the balancing of interests will usually favor the action taken by police. The majority reasoned that the individual's interest is minimal in the absence of a seizure. The corollary is that once a seizure has taken place, the individual's interest is no longer minimal and the balancing of interests will not necessarily favor the police action. Finally, considering the "real risk of abuse in allowing even well-intentioned stops to assist,"

the court concluded that it must act cautiously when weighing the public interest. Appendix B, at 16.

Turning to the facts of Kinzy's case, the court held the initial pre-seizure encounter was justified because Kinzy's interest was minimal at that point and because the officers may have been derelict in their duty had they not acted promptly to determine whether she needed assistance. Appendix B, at 17-18. Once the officers' grabbed Kinzy's arm, however, she was seized and her interest in being free from police intrusion was no longer minimal. Appendix B, at 20.

Balanced against Kinzy's interest was the public's interest in the safety of children. When examining the circumstances which led officers to seize Kinzy, however, the court concluded that the officers' actions were suggestive of the enforcement of a juvenile curfew law -- which Seattle does not have. Appendix B, at 20-21.

Relying on its decision in a prior case striking down a juvenile curfew law, the majority noted that it was at least questionable as to whether such laws impermissibly infringe on a minor's constitutional freedoms of association, expression and movement. Considering the questionable legality of juvenile curfew laws, the court concluded that the public's interest did not outweigh Kinzy's constitutional interests in freedom of association,

expression and movement. The majority therefore held that the officers' actions in seizing Loreal were unreasonable. Appendix B, at 21, 25-27 (citing State v. Pullman, 82 Wn.2d 794, 795 n.1, 514 P.2d 1059 (1973); State v. J.D., 86 Wn. App. 501, 511, 937 P.2d 630 (1997), review granted, 134 Wn.2d 1006, 954 P.2d 277 (1998)).[2]

Contrary to petitioner's overstated interpretation of the majority's opinion, the majority did not "conclude that a person may not be detained pursuant to the community caretaking function." See Petition for Writ of Certiorari, at 5. In discussing the sequence of events, the court stated that during the pre-seizure encounter when police suspected no criminal activity, Kinzy "should have been able to walk away and terminate the encounter." Appendix B, at 19. Although petitioner and Justice Talmadge, writing in dissent,[3] interpret this statement to mean that police may never seize an individual who they do not suspect of criminal activity without a warrant, that misinterprets the majority decision. Immediately thereafter in its opinion, the majority stated that once Kinzy was seized, the reasonableness of that seizure depended upon the balancing test. Appendix B, at 20-21. The majority then proceeded to balance Kinzy's interest against the public's,

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[2] Review in J.D. was later dismissed as improvidently granted. Appendix B, at 21 n.61.

[3] Appendix B (dissent), at 1.

ultimately concluding that Kinzy's interest prevailed. The context of the court's comments show that the majority did not rule that the community caretaking exception could never justify a warrantless detention or seizure. Otherwise, it would not have engaged in the balancing test. Appendix B, at 19-20.

REASONS FOR DENYING THE WRIT

This Court has already held that a police officer's warrantless search or seizure may be justified under the community caretaking exception, where the officer has reason to believe that the public safety is at risk. This Court has further indicated that the standard by which such searches and seizures are to be judged is reasonableness. The state courts and Circuit Courts of Appeal have had little difficulty applying these principles. Further guidance from this Court is therefore unnecessary.

Despite petitioner's assertions, there is no significant conflict between the states or the Circuit Courts of Appeal regarding the legitimacy of the community caretaking exception and that it may be used to justify warrantless searches and seizures under a variety of circumstances. The Washington Supreme Court's decision in the instant case is consistent with these holdings.

Although petitioner frames the question presented in this case as whether the community caretaking exception applies outside the context of automobile searches, the real question presented is whether the Washington Supreme Court majority struck the appropriate balance in the instant case. Because reasonableness under the Fourth Amendment is determined on a case by case basis, however, the balance struck by the Washington Supreme Court in one particular case cannot be considered a question of national public importance.

1. **Further Guidance on the Community Caretaking Exception is Unnecessary Because this Court has Already Articulated the Applicable Standard by which Community Caretaking Intrusions are to be Judged: Reasonableness.**

This Court first defined the community caretaking exception to the warrant requirement in Cady v. Dombrowski, 413 U.S. 433, 441, 93 S. Ct. 2523, 37 L. Ed. 2d 706 (1973). Retired Chicago police officer Chester Dombrowski had disabled his car by driving it into a guardrail. A passing motorist drove Dombrowski into town and he subsequently called the police. Two officers responded and drove with Dombrowski back to the accident scene to make out a report. Along the way, the officers came to the conclusion that Dombrowski was drunk. After taking various measurements

of the vehicle for the accident report, the officers took Dombrowski into custody and had the car towed to a garage. Cady, 413 U.S. at 435-36.

Believing that Chicago officers were required to wear their service revolvers at all times, and finding no revolver in Dombrowski's possession, one of the officers eventually drove to the garage to look for the service revolver within the disabled vehicle. Upon searching the trunk of the car, the officer discovered evidence connecting Dombrowski to a murder. Cady, at 436-37.

In determining whether the warrantless search was legal, the Court noted that the ultimate standard set forth in the Fourth Amendment is reasonableness. Cady, 413 U.S. at 439. The court also recognized that the duties of local police officers were not limited solely to the investigation of criminal activity:

> Local police officers, unlike federal officers, frequently investigate vehicle accidents in which there is no claim of criminal liability and engage in what, for want of a better term, may be described as community caretaking functions, totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute.

Cady, 413 U.S. at 441. As a result, the Court had on two prior occasions validated the warrantless search of a vehicle by state officers as a valid exercise of their community caretaking functions. Cady, 413 U.S. at 441-42

(citing Harris v. United States, 390 U.S. 234, 88 S. Ct. 992, 19 L. Ed. 2d 1067 (1968); Cooper v. California, 386 U.S. 58, 87 S. Ct. 788, 17 L. Ed. 2d 730 (1967)).

In Harris, the justification for the initial intrusion into the vehicle was to safeguard the owner's property, whereas in Cooper it was to guarantee the safety of the police who held the car in custody. While recognizing that the justification in Cady was distinct, the Court nevertheless concluded the justification was just as immediate and constitutionally reasonable as those in Harris and Cooper: "concern for the safety of the general public who might be endangered if an intruder removed a revolver from the trunk of the vehicle." Cady, 413 U.S. at 447.

In upholding the search of Dombrowski's car, the Court reiterated the general reasonableness standard of the Fourth Amendment, noting that a detailed formula for judging cases such as these would not be useful.

> The Framers of the Fourth Amendment have given us only the general standard of "unreasonableness" as a guide in determining whether searches and seizures meet the standard of that Amendment in those cases where a warrant is not required. Very little that has been said in our previous decisions, . . . , and very little that we might say here can usefully refine the language of the Amendment itself in order to evolve some detailed formula for judging cases such as this.

Cady, 413 U.S. at 448.

Thus in Cady, this Court already made clear that warrantless searches and seizures may be justified where the officer has reason to believe that someone's safety might be at risk. See also South Dakota v. Opperman, 428 U.S. 364, 374, 96 S. Ct. 3092, 49 L. Ed. 2d 1000 (1976) (stating that the sole justification for the warrantless incursion in Cady was that it was incident to the caretaking function of the local police to protect the community's safety). This Court has further indicated that the standard by which such searches and seizures are to be judged is reasonableness.

The state courts and courts of appeal have had little difficulty applying these principles, the state courts and the Circuit Courts of Appeal have had little difficulty applying these principles to uphold the warrantless search or seizure of an individual under a variety of circumstances, particularly where the officer believed the individual represented a danger to himself or others. Further guidance from this Court is therefore unnecessary. This Court should deny the writ.

2. There is no Discernable Conflict among the States or Among the Courts of Appeal Regarding the Legitimacy of the Community Caretaking Exception.

From California to Maine, many state supreme courts have recognized the community caretaking exception and that it may justify warrantless searches and seizures under a variety of circumstances. See,

e.g., People v. Ray, 88 Cal. Rptr. 2d 1, 11-14 (1999) (warrantless entry through open door of residence by officers, who had received report from neighbor that door had been open all day and that residence was a "shambles," was justified under community caretaking exception); Commonwealth v. Smigliano, 427 Mass. 490, 493, 694 N.E.2d341 (1998) (recognizing search or seizure may be justified where facts give rise to a reasonable belief that defendant is in need of immediate assistance); State v. Carlson, 548 N.W.2d 138, 141-42 (Iowa 1996) (forced entry into residence justified to make welfare check on a woman reported missing where it had also been reported by relatives that the woman's boyfriend was abusive and had given conflicting stories about the woman's whereabouts); State v. Konewko, 529 N.W.2d 861, 863 (N.D. 1995) (officer's opening driver's door of defendant's parked motor vehicle was justified because officer observed defendant sliding toward floor and door, and therefore probably thought defendant needed help); State v. Brown, 509 N.W.2d 69 (N.D. 1993) (though officer may be fully justified in stopping vehicle to provide assistance, stop in instant case was invalid as officer failed to provide any clear reason for thinking defendant needed assistance); People v. Davis, 442 Mich. 1, 24, 947 N.W.2d910 (1993) (holding that when the police are investigating a situation in which they reasonably believe someone

is in need of immediate aid, their actions should be governed by the emergency aid doctrine, regardless of whether these actions can also be classified as community caretaking activities); Provo City v. Warden, 844 P.2d 360, 364 (Utah Ct. App. 1992), aff'd, 875 P.2d 557 (Utah 1994) (holding that seizure under community caretaking exception not justified unless circumstances indicate a danger to life or limb); State v. Marcello, 157 Vt. 657, 658, 599 A.2d 357 (1991) (a passing motorist's tip -- "there is something wrong with that man" -- was sufficient to justify trooper's making a "public interest" stop to determine whether defendant needed assistance); State v. Green, 133 N.H., 249, 256, 575 A.2d 1308 (1990) (articulable suspicion of crime not needed where police "regulati[ing] the movements of civilians at crime scenes"); State v. Pinkham, 565 A.2d 318 (Me. 1989) (officer's observation of defendant motorist's misuse of marked lanes furnished sufficient reason to justify stop for purely safety purposes to advise defendant of his misuse; citing Cady); State v. Anderson, 142 Wis.2d 162, 417 N.W.2d 411, 413 (App. 1987), rev'd on other grounds, 155 Wis.2d 77, 454 N.W.2d 763 (1990) (setting forth test by which community caretaking seizures to be judged); State v. Harrison, 111 Ariz. 508, 509, 533 P.2d 1143 (1975) (officer justified in stopping defendant's

motor vehicle after observing left tire of defendant's vehicle "bouncing"; "the state has a valid interest in the safety of its highways for travelers").

In a number of states where its highest court has yet to address the community caretaking exception, the state's lower courts have also recognized the legitimacy of the exception. See, e.g., State v. Alexander, 124 Md. App. 258, 261-62, 721 A.2d 275 (1998) (warrantless entry of residence on Thanksgiving justified where an anonymous caller reported to police that although he believed his next door neighbor was away, his basement door was wide open, and where the responding officer corroborated the open door); Commonwealth v. Waters, 20 Va. App. 285, 291, 456 S.E.2d 527 (1995) (citing Cady, officer's stop of defendant was justified as reasonable exercise of community caretaker function where defendant's unsteady walking led to reasonable belief that aid or assistance was needed); State v. Martinez, 260 N.J. Super. 75, 78, 615 A.2d 279 (App. Div. 1992) (officer's stop justified where defendant was driving at an extremely low speed because such low speed was possibly an indication that there was something wrong with the driver or the motor vehicle, a threat to approaching vehicles, or an indication that the neighborhood is being "cased"); Ozhuwan v. State, 786 P.2d 918, 922 (Alaska Ct. App. 1990) (officer's seizure of defendant was not justified under Terry or the

community caretaking exception where defendant had parked her car legally but in an area frequently used by minors to consume alcohol).

The Washington Supreme Court's decision in Kinzy is consistent with the above listed cases. Despite petitioner's assertions, the majority did not hold that the community caretaking exception can never justify a warrantless seizure. See Statement of the Case, supra (discussing majority's opinion). On the contrary, the majority recognized that the community caretaking exception can justify warrantless searches and seizure, but that under the circumstances presented in Kinzy's case, the seizure was unreasonable. In other words, Kinzy's interest in being free from police interference outweighed the public interest in enforcing a nonexistent curfew law. Kinzy therefore does not evidence a "conflict" among the states regarding the community caretaking exception, as the petitioner contends.

The only other case petitioner cites as representing a "conflict" among the states is People v. Murray, 137 Ill.2d 382, 560 N.E.2d309, 311 (1990). According to Murray, a community caretaking function "involves no coercion or detention and therefore does not involve a seizure." Murray, 560 N.E.2d at 311. Considering the wealth of cases cited above holding that under certain circumstances, officers may be justified in conducting warrantless searches or seizures pursuant to their community caretaking

functions, the Illinois opinion appears to be an anomaly. In any event, one case standing alone does not present the kind of "conflict" among the states sufficient to create an issue of national importance.

Nor is there a significant conflict among the Circuit Courts of Appeal. See, e.g., Easyriders Freedom F.I.G.H.T.v. Hannigan, 92 F.3d 1486, 1497 (9th Cir. 1996) (police can stop any motorcyclist wearing a helmet that looks like noncomplying variety, even though cyclist commits no offense if he lacks actual knowledge that the helmet does not comply, because stop serves dual purpose of identifying individuals who intentionally violate the law, and informing riders who are unknowingly wearing noncomplying helmets that their helmets do not comply and possibly will not protect them sufficiently); United States v. Rohrig, 98 F.3d 1506 (6th Cir. 1996) (citing Cady and holding that government interest in immediately abating an ongoing nuisance by quelling loud and disruptive noise in a residential neighborhood is sufficiently compelling to justify warrantless intrusions under some circumstances); United States v. Brown, 64 F.3d 1083, 1086 (7th Cir. 1995) (holding that the police are not required to stand outside an apartment, despite legitimate concerns about the welfare of the occupant, "unless they can hear screams."); United States v. King, 990 F.2d 1552, 1561 (10th Cir. 1993) (officer justified in detaining defendant's motor

vehicle in order inform defendant of hazardous conditions and to advise him to stop honking); United States v. Johnson, 9 F.3d 506, 509-10 (6th Cir. 1993), rehearing denied, 16 F.3d 680, cert. denied, 512 U.S. 1212, 114 S. Ct. 2690, 129 L. Ed. 2d 821 (1994) (upholding warrantless entry of residence where circumstances indicated burglary in progress, albeit under guise of "exigent circumstances" exception); United States v. Rideau, 949 F.2d 718, 720 (5th Cir. 1991) (officers who observed the defendant standing in the middle of the road at 10:30 p.m. and who observed the defendant stumble as he stepped from the road, were justified in stopping defendant to check on his condition, under community caretaking functions); United States v. Dunbar, 470 F. Supp. 704, 706-08, (D. Conn. 1979), affirmed, 610 F.2d 807 (2nd Cir. 1979) (recognizing community caretaking exception, but holding that officer was not justified in stopping motorist he believed was lost).

In support of its argument that there is a conflict among the Circuit Courts of Appeal, petitioner cites: Unites States v. Bute, 43 F.3d 531 (10th Cir. 1994) (holding that community caretaking exception to the warrant requirement is applicable only in cases involving automobile searches); United States v. Erickson, 991 F.2d 529 (9th Cir. 1993) (same); and United States v. Pichany, 687 F.2d 204 (7th Cir. 1982) (declining to extend Cady's

community caretaking exception to the warrantless search of an unlocked warehouse during a burglary investigation).

The Seventh Circuit's decision in Pichany, however, does not necessarily conflict with the decisions from other circuits cited above. Although Pichany interpreted Cady as limiting the community caretaking exception to the search of automobiles, Pichany nevertheless suggested in dicta that the search of the warehouse might have been justified had the officers entered to protect the public from potential danger, as evidenced in the following passage.

> None of the factors which the Court found characterized the community caretaking function are present here. First, the police exercised no control or dominion over the property. . . . Second, in contrast to Cady the police here were under no obligation to secure the warehouse or to preserve its contents . . . The officers did not claim to have entered the defendant's warehouse to protect themselves or the public from potential danger.

Pichany, 687 F.2d at 207.

Significantly, the Seventh Circuit more recently has upheld the brief search of a residence where officers believed the occupant might be in danger. United States v. Brown, supra, 64 F.3d 1083, 1086. There, officers were conducting a buy/bust operation that led to the arrest of Chris Johnson. Johnson agreed to "finger his source, Ty." The officers drove to the

location indicated by Johnson and eventually arrested Tyron Brown as Johnson's source. Brown, 64 F.3d at 1084.

When arrested, Johnson had been driving someone else's car. He claimed not to know the owner, but said a friend had lent the car to him. The glove compartment of the car contained a rental agreement for a different auto; the customer was Fannie Bonds, who listed her residence as Apartment 203 of an address in Brown Deer, Wisconsin. As it turned out, the apartment was located immediately to the north of where Brown was standing at the time of arrest. Brown claimed he did not live nearby, but had a key to Apartment 203. Police became concerned that Fannie Bonds might be the "victim of auto theft -- or worse." After receiving no answer, the officers unlocked the apartment and quickly checked each room. In doing so, they discovered cocaine. Brown, 64 F.3d at 1084.

The Seventh Circuit upheld the initial entry, stating: "We do not think that the police must stand outside an apartment, despite legitimate concerns about the welfare of the occupant, unless they can hear screams." Brown, at 1086. Because the officers had reason to fear for Bonds' safety, the court concluded that the officers could "take some steps to protect her." Brown, at 1086 (citing Murdock v. Stout, 54 F.3d 1437, 1442 (9th Cir. 1995)). While the court did not formally label the officer's actions as

"community caretaking functions," the Seventh Circuit implicitly recognized the essence of that exception by upholding the search in question.

Like the Seventh Circuit, the Ninth Circuit has also recognized the essence of the community caretaking exception, although including it within the rubric of "exigent circumstances." As pointed out by petitioner, the Ninth Circuit in Erickson interpreted Cady's community caretaking exception as confined to automobile searches and therefore declined to uphold the warrantless search of a residence under the caretaking exception. Erickson, 991 F.2D at 532. The court nevertheless recognized that a warrantless search of a residence could be justified under limited circumstances.

> Of course, to say that a police officer may not conduct a warrantless search of a residence merely because he is performing a community caretaking function does not mean that such a search may never be made. In a wide variety of contexts, this and other circuits have upheld warrantless searches conducted during burglary investigations under the rubric of exigent circumstances.[4]

Erickson, at 533 (citations omitted).

Consistent with the above passage, in a later case, the Ninth Circuit upheld the warrantless entry into a private residence under the exigent

---

[4] Because the government did not challenge the district court's holding that exigent circumstances did not exist to justify the intrusion, the Ninth Circuit did not pass upon that ruling. Erickson, 991 F.2d at 533.

circumstances exception where the "police officers . . . had a fair probability that something was amiss inside the house and that a resident might be in need of assistance. Murdock v. Stout, 54 F.3d 1437, 1443 (9th Cir. 1995). The court defined exigent circumstances as:

> those circumstances that would cause a reasonable person to believe that entry . . . was necessary to prevent physical harm to the officers or other persons, the destruction of relevant evidence, the escape of the suspect, or some other consequence improperly frustrating legitimate law enforcement efforts.

Murdock, 54 F.3d at 1441 (citations omitted, emphasis added). Because the Ninth Circuit's definition of exigent circumstances includes situations where officers or other persons might be in danger, the Ninth Circuit's exigent circumstances exception recognizes within it the same exception that other circuits have labeled separately as the community caretaking exception. Therefore, the Ninth circuit does not significantly depart from the other circuits.

While the decisions of the Seventh and Ninth Circuits may not say the magic words "community caretaking" exception, their holdings implicitly recognize that the exception applies outside the context of automobile searches, in appropriate limited circumstances. As a result, the only remaining circuit cited in the state's brief as representing a conflict is the Tenth Circuit. One jurisdiction, whether state or federal, however, does not

represent a conflict of sufficient import to require resolution by the United States Supreme Court. This Court should deny the writ.

3. The Constitutionality of the Community Caretaking Exception is Well-Settled and therefore not an Issue of Substantial National Importance.

Contrary to petitioner's assertion, "[t]he ability of the police to constitutionally engage in brief non-investigatory detentions of persons" is not a recurring question of substantial national importance that should be addressed by this Court. See Petition for Writ, at 14. As Cady held over twenty-five years ago, the ultimate test to be applied under such circumstances is reasonableness. Cady, 413 U.S. at 448. Whether a given stop is reasonable "depends on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers." United States v. Brignoni-Ponce, 422 U.S. 873, 878, 45 L. Ed. 2d 607, 95 S. Ct. 2574 (1975).

As the cases in the preceding section demonstrate, the state courts and the Circuit Courts of Appeal have had little difficulty applying these principles to uphold the warrantless search or seizure of an individual under a variety of circumstances, particularly where the officer believed the individual represented a danger to himself or others. See, e.g., United States v. Rideau, supra, 949 F.2d at 720; Provo City v. Warden, supra, 844 P.2d

at 364; see also State v. Hutchison, 56 Wn. App. 863, 866, 785 P.2d 1154 (1990) (an officer may reasonably render aid and assistance to a person who is in danger and in need of help).

The Washington Supreme Court's decision in the instant case likewise recognized that a warrantless seizure to check on an individual's safety may be justified under appropriate limited circumstances. Under the circumstances presented, however, the court concluded that Kinzy's seizure was unreasonable.

Although petitioner frames the issue presented as whether the community caretaking exception extends beyond the search of automobiles, the real issue presented is whether the Washington Supreme Court majority struck the appropriate balance in the instant case. Because the police action in question suggested the enforcement of a nonexistent curfew law, the majority correctly concluded Loreal's interest was more weighty than the public's. In any event, because reasonableness must be determined on a case by case basis, whether the Washington Supreme Court struck the appropriate balance in a particular case cannot be considered an issue of national significance.

Moreover, whether the officers in the instant case were acting "in accordance with Washington's Family Reconciliation Act," as petitioner

contends, is an issue of local, not national, concern. This Court should deny the writ.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

DANA M. NELSON, WSBA 28239

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Supreme Court of the United States

No. 00-679

Washington,

Petitioner

v.

Loreal Monique Kinzy

ON PETITION FOR WRIT OF CERTIORARI to the Supreme Court of Washington, No. 68239-9.

ON CONSIDERATION of the petition for a writ of certiorari herein to the Supreme Court of Washington.

IT IS ORDERED by this Court that the said petition be, and the same is hereby, denied.

January 8, 2001

A true copy WILLIAM K. SUTER
Test:
Clerk of the Supreme Court of the United States
By _____ Deputy

Supreme Court of the United States

No. 00-679

Washington,

Petitioner

v.

Loreal Monique Kinzy

ON CONSIDERATION of the motion of respondent for leave to proceed in forma pauperis,

IT IS ORDERED by this Court that the said motion, be, and the same is hereby, granted.

January 8, 2001

(3)

NO. 00-679

IN THE SUPREME COURT OF THE UNITED STATES

STATE OF WASHINGTON,

Petitioner,

vs.

LOREAL KINZY,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Washington

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APPENDICES TO BRIEF IN OPPOSITION

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12 pp

APPENDIX A

FILE
IN CLERK'S OFFICE
COURT OF APPEALS
STATE OF WASHINGTON-DIVISION I
DATE MAY 17 1999
CHIEF JUDGE

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. L.K., B.D. 05-02-81, Appellant.	No. 42824-1-I DIVISION ONE PUBLISHED OPINION FILED: MAY 17 1999

AGID, A.C.J. -- L.K. appeals the trial court's order denying her motion to suppress narcotics the police found after they stopped and frisked her. Because the officers were legitimately concerned for the welfare of a young girl who was out late on a school night accompanied by known narcotics users in a high narcotics trafficking area, and there is no evidence of a pretext stop, we affirm.

FACTS

At about 10:10 p.m. on March 3, 1998, a school night, Seattle Police Officers Jennings and Kim were on uniformed bicycle patrol in downtown Seattle.[1] They saw L.K., who was accompanied by two females and an older male, at the corner of Third Avenue and Stewart Street. They focused on her because of her youthful appearance, it was a school night, and Third and Stewart is known to the officers as a high narcotics trafficking area. Officer Jennings recognized the older male from previous narcotics contacts, and Officer Kim recognized L.K.'s three companions as having been involved in an earlier narcotics buy-bust operation.

L.K. appeared to Officer Jennings to be between 11 and 13 years old,[2] and much smaller than her three companions who appeared to be in their early 20's. L.K. was the only person of that age on the street at that time of night, and the officers both thought L.K. was a youth at risk. Officer Kim routinely stops and speaks with children under 18 years old who are on the street at night.

Officer Jennings asked L.K. to stop and speak with him. L.K. ignored him and kept walking; the other three stopped. Officer Jennings repeated his request, but L.K. put her head down and continued walking, so Officer Jennings stopped L.K. by taking hold of her arm.

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[1] The facts are derived from the written findings of fact and conclusions of law from the suppression hearing. None of the written findings are challenged. They are therefore verities on appeal. State v. Stenson, 132 Wn.2d 668, 697, 940 P.2d 1239 (1997), cert. denied, ___ U.S. ___, 118 S. Ct. 1193, 140 L. Ed. 2d 323 (1998).

[2] Officer Kim thought that L.K. could have been between 13 and 15.

The officers asked L.K. her age and name. She eventually told them she was 16 years old, but they did not believe her because she looked so young. L.K. acted nervous and put her hands into her coat four different times even though the officers asked her to keep her hands in view. Officer Jennings told her that if she did not keep her hands in view, he would pat her down. When L.K. did not comply, Officer Jennings patted her down for weapons. He felt a hard object in an inside pocket of L.K.'s jacket and asked her to open the jacket so he could get to it.[3] As soon as L.K. unzipped the jacket, Officer Jennings saw what he suspected to be white- or cream-colored flecks of rock cocaine on its black lining. He recognized the substance from his experience with narcotics and many narcotics-related arrests and knew that the flecks were not lint or crumbs of food. The flecks field tested positive for cocaine. After L.K. was arrested, Officer Kim found 1.4 grams of cocaine in her bra.

L.K. was charged with one count of possession of cocaine. The trial court held a fact-finding hearing and a hearing on L.K.'s motion to suppress the cocaine. It denied her motion and found she committed the offense. The court's written conclusions state:

> I. REASONS FOR THE ADMISSIBILITY OF THE EVIDENCE SOUGHT TO BE SUPPRESSED:
>
> 1. The court finds that the Officers had a reasonable basis for approaching and questioning the Respondent to determine her age and whether she a [sic] youth at risk.
>
> 2. The court finds that due to the Respondent's perceived height of 4'9" (verified as 5'1" at fact finding), perceived age of

[3]The object in L.K.'s pocket turned out to be a comb or brush. For his safety, Officer Jennings had L.K. keep her coat open after he discovered it.

between 11 and 13, the late hour, her presence in a high narcotics area, the fact that she was in the company of a person associated with narcotics, all added to provide the officers with proper grounds to approach the Respondent as a youth at risk.

3. The court finds that due to her furtive movements, bulky clothing and refusal to keep her hands in view, there was a reasonable and grounded concern for officer safety which prompts and justifies a pat-down for weapons.

4. The court finds that Officer Jennings acted reasonably when he requested the Respondent to keep her jacket open so he could see where her hands were.

5. The court finds that the Officers were lawfully engaging the Respondent based on their concerns for her safety as a potential youth at risk.

6. The court finds that [O]fficer Jennings saw, in plain view, what he thought to be particles of rock cocaine on the black lining of the Respondent's coat.

7. The court finds that Officer Jennings could differentiate between the suspected narcotics and other items such as lint or food crumbs because of his experience, both on the street and formal training, in the area of narcotics.

8. Relevant factors considered by the court, were taken in light of the circumstances at hand and the officers training and experience.

9. The court finds the testimony of the officers credible. . . . [4]

The court also incorporated its oral findings and conclusions in its written findings. A timely appeal followed.

DISCUSSION

L.K. argues that the evidence established that (a) the arresting officers had no valid basis to stop her, (b) the pat-down search was not justified by officer safety concerns, and (c) the officers' pat-down exceeded its proper scope. We

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[4] The State has moved to supplement the Clerk's Papers with the written findings and conclusions signed by the factfinding judge on July 30, 1998, and apparently misfiled in another superior court case on August 12, 1998. The motion is granted.

hold that the officers' actions were justified by the surrounding circumstances and their role as community caretakers and that the pat-down was proper.

Warrantless seizures are per se unreasonable under the Fourth Amendment of the United States Constitution and Article 1, section 7 of the Washington Constitution.[5] Under the Fourth Amendment, a person is seized "when restrained by means of physical force or a show of authority."[6] We agree with L.K. that she was seized when Officer Jennings took hold of her arm after she ignored the officers' requests that she stop.

The State bears the burden of proving that a warrantless seizure falls within one of the "'"jealously and carefully drawn" exceptions'" to the warrant requirement.[7] One of those exceptions is the "community caretaking function" in which an officer makes a citizen contact unrelated to any criminal investigation.[8] To determine whether a community caretaking encounter between an officer and a citizen is reasonable, a court must balance

> the individual's interest in freedom from police interference against the public's interest in having the police perform a "community caretaking function".[9]

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[5] State v. Williams, 102 Wn.2d 733, 736, 689 P.2d 1065 (1984).

[6] State v. Thorn, 129 Wn.2d 347, 351-52, 917 P.2d 108 (1996). L.K. mentions, but does not present argument regarding, Article 1, section 7. This court will not, therefore, consider whether L.K. is provided greater protection under our Constitution. See Thorn, 129 Wn.2d at 352 n.3.

[7] State v. Houser, 95 Wn.2d 143, 149, 622 P.2d 1218 (1980) (quoting Arkansas v. Sanders, 442 U.S. 753, 759, 99 S. Ct. 2586, 61 L. Ed. 2d 235 (1979)).

[8] State v. Menneqar, 114 Wn.2d 304, 313, 787 P.2d 1347 (1990).

[9] Id.

In this case, the issue is whether the officers were properly performing this function when they stopped L.K.

As a preliminary matter, we cannot overemphasize the potential for abuse of the community caretaking warrant exception, particularly in the context of protecting child welfare. At oral argument, L.K. correctly noted that unfettered police interference with juveniles at night creates a de facto curfew law, the formal version of which we have rejected as unconstitutional.

> [C]ourts have struck down . . . curfew ordinances because their reach was too broad. . . . [Because] the number of juveniles engaged in safe and innocent activity almost certainly outnumbers those engaged in criminal activity, . . . courts have held that confining all of them to their homes or a few designated activities without evidence that such Draconian restrictions were necessary to address juvenile crime is not a narrowly tailored response to the problem.[10]

The balancing test we apply to determine whether the police are in fact exercising their community caretaking function reflects these concerns by requiring a court to review the extent to which an individual's interest in freedom from police interference has been violated.[11] It ensures that police do not abuse this function with "shake downs," pretext stops or undue interference with juveniles' rights to privacy and travel.

Against these principles we must balance legislative expressions of the public interest in protecting children. Because this case involved a narcotics trafficking area, we focus particularly on the concern that children not be involved with illegal drugs. State and local laws encourage police to inquire into and

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[10] State v. J.D., 86 Wn. App. 501, 508-09, 937 P.2d 630 (1997).
[11] Mennegar, 114 Wn.2d at 313.

prevent children from having contact with drugs. For example, it is a criminal offense to involve a person under 18 years old in a drug transaction;[12] to provide a person under 18 with drug paraphernalia;[13] and to conduct drug transactions in or within 1,000 feet of schools, of school bus stops, or in school buses or public parks.[14] In addition, Seattle Police Officers are specifically charged with investigating juvenile delinquency.[15] These laws all reflect the legislative policy that police officers look out for the safety of children, particularly when they may be exposed to drugs. Here, the record establishes that the officers' sole concern was for L.K.'s welfare, and the circumstances spoke loudly of the possibility that she was involved with people known to be involved with drugs.

Both officers worked the night shift, 7 p.m. to 4 a.m. As we noted earlier, Officer Kim makes a point of speaking to children under the age of 18 who are out late at night. Officer Jennings testified that he stopped L.K. because

> [w]e wanted to find out how old she was and to do a check for her safety and question her why she was downtown, what her purpose was, who she was with, was she with family, was she by herself, does she know these people, those kind of questions.

He believed that L.K. might be a youth at risk[16] because she looked so young, was accompanied by a known drug user, and was out late on a school night. In

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[12] RCW 69.50.401(f).
[13] RCW 69.50.412(3).
[14] RCW 69.50.435(a)(1-5).
[15] See, e.g., SMC 12A.18.010 et. seq., which criminalizes (a) contributing to a child's abuse or neglect. and (b) contributing to a child's delinquency.
[16] We do not use the term "youth at risk" as a term of art. No evidence was presented, and the parties did not argue, that L.K. was an at-risk youth who had absconded from a juvenile dependency proceeding. See RCW 13.32A.

addition, L.K.'s three companions appeared to be much older. Officer Kim testified that L.K. appeared to be much younger than 16, and was much shorter than her companions. In addition, L.K. was the only person in the area of such youthful appearance. All three companions had been arrested before in a buy-bust operation.

Under these circumstances, the trial court correctly ruled that L.K.'s interest in being free of police interference was outweighed by the officers' legitimate attempt to find out if she was in trouble. Because she would not stop long enough to let them perform this function, the initial seizure of L.K. was justified.

L.K. also asserts that officers should not be allowed to use their role as community caretakers to circumvent constitutional requirements. But there is no evidence in the record that the stop was a pretext for an illegal search.[17] Instead, the officers made an individualized determination that L.K.'s welfare might be in jeopardy based upon the constellation of circumstances we described above. Taken together, these facts establish a legitimate basis for the officers' exercise of their community caretaking function.[18]

L.K. argues that once she told the officers her age, the encounter should have ended. But her argument ignores the circumstances of the encounter.

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[17] L.K. cites State v. Richardson, 64 Wn. App. 693, 694, 825 P.2d 754 (1992), in support of her argument. But the case is inapplicable. Richardson was not a juvenile, so the court had no reason to address child safety policy concerns. Id.

[18] The officers' individualized determination that L.K. could have been in danger distinguishes this case from State v. J.D., where we invalidated a curfew ordinance

Public policy supports the trial court's conclusion that the officers' actions were reasonable, given their concerns that L.K. was at risk. As part of their community caretaking function, the officers were entitled to satisfy themselves that L.K. was not in danger.

A contrary ruling would insulate criminals who prey upon children by involving them in prostitution, sexual exploitation and narcotics trafficking. Children subject to the influence and control of such people may well be afraid to come forward because they fear the repercussions. Public policy mandates that when officers become aware of a specific juvenile who may be at risk, they should be allowed to inquire into that child's welfare as a valid part of their community caretaking function.

Because we hold the seizure was proper, we must also address L.K.'s challenge to the frisk. Protective frisks of suspects temporarily in police custody are justified where officers have reasonable safety concerns based on "'specific and articulable facts'" which create an objectively reasonable belief that a suspect is 'armed and presently dangerous.'"[19] Reviewing courts

> are reluctant to substitute their judgment for that of police officers in the field. "A founded suspicion is all that is necessary, *some basis from which the court can determine that the [frisk] was not arbitrary or harassing.*"[20]

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founded on a generalized assumption that all juveniles contribute to crime in an area, or would necessarily be victimized if present in the area after hours.

[19] State v. Collins, 121 Wn.2d 168, 173, 847 P.2d 919 (1993) (quoting Terry v. Ohio, 392 U.S. 1, 21-24, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968)).

[20] State v. Belieu, 112 Wn.2d 587, 601-02, 773 P.2d 46 (1989) (quoting Wilson v. Porter, 361 F.2d 412, 415 (9th Cir. 1966)) (emphasis in original).

Factors that justify a protective frisk include any furtive gestures and movements the person makes in response to the officers' presence, the location of the suspect-officer contact, the time of day, whether the person ignored officers' requests to stop and whether his or her clothing could conceal a weapon.[21]

Under the Walker factors, these officers had a reasonable belief that L.K. could be carrying a weapon. They saw her at 10:10 p.m. She refused to look at the officers when they approached her and refused to stop when the officers asked to speak with her. During her contact with the officers, L.K. reached into her pockets four different times, despite requests that she keep her hands visible. And her jacket, a large "puffy" down jacket, could easily conceal a weapon. There was a legitimate basis for the officers' concerns for their safety.

L.K. cites State v. Terrazas[22] in support of her argument, but Terrazas is not persuasive. It involved a traffic stop in which a back-seat passenger had his hands under a blanket that covered his lap on a cold evening. Throughout the investigation and arrest process, the passenger remained in the rear seat of the car, did not move or make any furtive gestures, was calm, and answered all questions from the officers.[23] The court held these facts were insufficient to establish a reasonable belief that the passenger was armed and dangerous.[24]

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[21] State v. Walker, 66 Wn. App. 622, 630-31, 834 P.2d 41 (1992).
[22] 71 Wn. App. 873, 863 P.2d 75 (1993), review denied, 123 Wn.2d 1028 (1994).
[23] Id. at 874-75.
[24] Id. at 879.

Here, the officers' safety concern was objectively reasonable. L.K. made furtive gestures, would not stay still, was uncooperative, and was agitated.[25]

L.K. also challenges the scope of the frisk, arguing that Officer Jennings' request that she unzip her jacket was not justified. We hold that the officers did not exceed the valid scope of the frisk.

The scope of a Terry frisk is limited to its protective purpose.[26] Here, Officer Jennings testified on direct examination that when he frisked L.K. he felt a hard object: "It was felt on the outside, but the pocket was on the inside, so I asked [L.K.] to unzip her jacket so we could expose the area where the possible weapon could be." L.K. unzipped her coat, and the officer discovered the item in the inside pocket was a comb or brush. Officer Jennings saw the suspected cocaine as soon as she unzipped her jacket. Having felt a hard object which could have been a weapon, the officer was justified in finding out what it was. The request that L.K. unzip her jacket was therefore within the permissible scope of the frisk. The simultaneous plain view observation of the flecks of suspected cocaine and their seizure were proper.[27]

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[25] L.K. also cites State v. Alcantara, 79 Wn. App. 362, 364-65, 901 P.2d 1087 (1995). In Alcantara, the court ruled that a Terry frisk is improper where it is conducted solely because the frisking officer believed Alcantara was in possession of illegal drugs. Because Alcantara did not address a protective frisk, it does not apply here.

[26] Collins, 121 Wn.2d at 173.

[27] See State v. Kennedy, 107 Wn.2d 1, 9, 726 P.2d 445 (1986) (officers lawfully in a protected area may seize contraband they perceive with their senses, where the contraband is immediately recognizable as such by the officers).

CONCLUSION

We hold that where there is no evidence that an encounter between an officer and a juvenile is a pretext for an impermissible investigation and the circumstances surrounding the encounter demonstrate that the purpose of the officers is to ensure the safety and welfare of the juvenile, the officers have properly exercised their community caretaking function. We affirm the juvenile court's order denying L.K.'s motion to suppress and the conviction.

Azid, ACJ

WE CONCUR:

Appelwick, J

STATE OF WASHINGTON v. L.K., B.D. 05-02-81

NO. 42824-1

BAKER, J. – (dissenting) I respectfully dissent. The "community caretaking function" as an exception to the constitutionally required basis for the seizure of a citizen by police has never been so broadly or loosely described in the case law, nor should it be.

As the parties agree, L.K. was seized by the police as she was walking on the sidewalk of a major downtown Seattle street at about 10 PM on a weeknight. She was seized after she made clear by her actions that she did not choose to engage in a consensual encounter with uniformed Seattle Police Officers.

Prior to and at the time of her seizure, neither L.K. nor any of the three persons with whom she was walking had acted in any way suspiciously. There was no indication whatsoever that any drug related activity was occurring. There was nothing unusual about the conduct of any one of the four persons, nor was anything unusual observed about the interaction between L.K. and the others. There was nothing to justify an intrusion on the basis of exigent circumstances.

What were the factors that led to L.K.'s seizure? Although she was just short of 17 years old, the officers thought she could have been between 11 and 15. One of the three persons she was with was recognized as having a prior narcotics arrest.[1] She

[1] The fact that a person has previously been arrested for narcotics possession is not probable cause to believe that person is committing a crime. See State v. Hobart, 94 Wn.2d 437, 446-447, 617 P.2d 429 (1980). Obviously, a person's association with someone previously arrested does not provide any basis to seize that person.

was walking in an area of Seattle known to have drug activity.[2] It was about 10 PM. She did not choose to stop and talk to the police. No previous case anywhere has held that such factors, or anything close to them, justify the seizure of a citizen.

The majority opinion's focus on laws relating to drugs and persons under 18 years of age and the responsibility of the police to investigate juvenile delinquency is beside the point. There was no observed drug related activity, and certainly nothing to indicate juvenile delinquency was afoot. Although there was nothing to indicate L.K. was "in trouble," the officers nonetheless chose to interfere with her rights to privacy and movement. Notwithstanding the majority's discussion on public policy factors, I do not agree that the proper balance between those factors and L.K.'s freedoms is apparent in the outcome of this case.

What is apparent, as admitted by one of the officers, was that the officers were suspicious of possible criminal activity because of the time, the location, and the fact that L.K. did not want to talk. Such suspicions would not justify a Terry stop, and the State does not try to justify the seizure on that basis. Instead, the State argues that the seizure of L.K. was permitted by the "community caretaking function" exception to search and seizure constitutional requirements.

Judicial characterization of some police actions as community caretaking functions has its genesis in Cady v. Dombrowski.[3] Such activities were initially described as "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute."[4] Thereafter, the caretaking

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[2] The fact that a person is present in an area which has a history of crime is also irrelevant for purposes of probable cause. See State v. Ellwood, 52 Wn. App. 70, 74, 757 P.2d 547 (1988).

[3] 413 U.S. 433, 37 L.Ed 2d 706, 93 S.Ct. 2523 (1973).

[4] Cady, 413 U.S. at 441.

exception has been considered mostly in cases dealing with automobile impoundment.[5] No case cited by the State or by the majority has ever utilized this limited and cautiously applied exception to Fourth Amendment rights to justify the seizure of a person, much less on such flimsy grounds as these.

It is ironic that this court recently invalidated a youth curfew ordinance, ruling that minors have the same fundamental right of freedom of movement that adults have.[6] It is quite difficult to logically correlate that holding with the extravagant and completely unsupported assertion in the majority's opinion that a "contrary ruling [in this case] would insulate criminals who prey upon children by involving them in prostitution, sexual exploitation and narcotics trafficking."[7]

Finally, the facts in this case are that the other three persons with L.K. stopped voluntarily when approached by the police. Any desire by the police to clarify the situation could certainly have been satisfied by querying those individuals. But, if any of

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[5] See, e.g., State v. Houser, 95 Wn.2d 143, 152, 622 P.2d 1218 (1980), where our Supreme Court held that the exception could not be used to justify the seizure of an automobile merely because the police suspected it might be stolen; State v. Mennegar, 114 Wn.2d 304, 309, 787 P.2d 1347 (1990), which held that police could check for a valid operator's license before turning a car over to a passenger in a vehicle validly stopped for a traffic violation where the driver was inebriated.

[6] State v. J.D., 86 Wn.App. 501, 507, 937 P.2d 630 (1997).

[7] The majority cites no authority for this proposition. Moreover, it is worth noting that L.K. walked away from the three individuals who stopped and spoke with the police. Although the officers were familiar with those individuals, the record does not indicate that the officers were familiar with L.K., that she was involved in any illegal activities, or that she was being exploited or restrained in any way. Thus, it is not apparent that "the officers were entitled to satisfy themselves that L.K. was not in danger."

them had decided not to stop and talk to the police, they most certainly could not have been constitutionally seized by the police. I can see no valid basis for the seizure of L.K., either. I would reverse.

Baker, J.

APPENDIX B

FILE
IN CLERKS OFFICE
SUPREME COURT, STATE OF WASHINGTON
DATE JUL 2 7 2000
CHIEF JUSTICE

RECEIVED
JUL 2 3 2000
NIELSEN & BROMAN

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	Number 68239-9
Respondent	)	En Banc
v.	)	
LOREAL MONIQUE KINZY,	)	
Petitioner	)	Filed JUL 2 7 2000

SMITH, J.—Petitioner Loreal Monique Kinzy seeks review of a decision of the Court of Appeals, Division I, which affirmed her conviction in the King County Superior Court, Juvenile Division, for possession of cocaine in violation of the Uniform Controlled Substances Act under RCW 69.50.401(d) and an order denying her motion to

suppress evidence of cocaine.[1] The Court of Appeals concluded the cocaine was not the fruit of an illegal "search and seizure" because Respondent, acting under its community caretaking function, was lawfully entitled to "seize" Petitioner, a 16-year-old minor.[2] This Court granted review. We reverse.

QUESTION PRESENTED

The question presented in this case is whether, under the Fourth Amendment to the United States Constitution, the "community caretaking function" exception permits police officers to lawfully "seize" a 16-year-old minor without a warrant when the officers have no reason to believe the minor has committed a criminal offense, but the minor is standing on a public sidewalk in a high narcotics trafficking area on a school night with several others, including an older person believed by the officers to be associated with narcotics.

STATEMENT OF FACTS

Petitioner Loreal Monique Kinzy, a minor born May 2, 1981, was charged by information in the Juvenile Department of the King County Superior Court on March 6, 1998 with possession of cocaine in violation of the Uniform Controlled Substances Act

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[1] *State v. L.K.*, 95 Wn. App. 686, 977 P.2d 39 (1999).

[2] *Id.* at 691-95.

under RCW 69.50.401(d).[3] During a fact-finding hearing on May 7, 1998, Petitioner filed a motion to suppress evidence of cocaine.[4] The Honorable Liem E. Tuai, judge pro tempore, denied the motion and on July 30, 1998 signed "Written Findings of Fact and Conclusions of Law to Comply with CrR 3.6," which recited:[5]

> I. THE UNDISPUTED FACTS:
>
> 1. On [Tuesday] March 3, 1998, Seattle Police Officers M.B. Jennings and D.K. Kim were working as uniformed bicycle patrol officers. At 2210 hours (10:10 p.m.) the officers encountered [Ms. Loreal Monique Kinzy] at the NorthWest [sic] corner of Third Avenue and Stewart Street in downtown Seattle. It was a school night. This area is known to the officers as a high narcotics trafficking area. [Ms. Kinzy] appeared to the officers to be between 11 and 13 years old. [She] was in the company of two other girls and an older male. The older male was familiar to the officers due to previous narcotics contacts.
>
> 2. When the officers hailed [Ms. Kinzy], she put her head down and continued to walk away. [She] was restrained by the officers and asked her age and name. At some point in time [Ms. Kinzy] told the officers that she was 16 years old. The officers did not believe that [she] was 16 due to her very youthful appearance. [Ms. Kinzy] acted nervous and kept putting her hands into her coat. She was patted down for weapons by Officer Jennings.
>
> 3. Officer [sic] felt a hard object in [Ms. Kinzy's] coat. When it was examined it turned out to be a comb/brush. Officer Jennings had [Ms. Kinzy] keep her coat open after discovering the comb, again for officer safety.

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[3] Clerk's Papers at 1.

[4] Report of Proceedings at 3, May 7, 1998.

[5] Clerk's Papers at 7; Report of Proceedings at 70-72, May 7, 1998.

4. Officer Jennings saw what he suspected to be white/creme flecks of rock cocaine on the black lining of [Ms. Kinzy's] coat.

5. This suspicion was based on the officers [sic] experience with narcotics and his many narcotics related arrests.

6. Officer Jennings testified that the flecks were not "lint' [sic] nor crumbs of food. By color and consistency, Officer Jennings identified the flecks as being possible rock cocaine.

7. The flecks field tested positive for cocaine.

8. Officer[s] Jennings and Kim testified that they perceived [Ms. Kinzy] to be a "youth at risk" when they approached her.

9. Because of the high drug area, the hour, the fact that it was a school night, that [Ms. Kinzy] appeared so young in age, and due to one of her companions being associated with narcotics, [Ms. Kinzy] stood out.

10. After the field test came back positive for cocaine, [Ms. Kinzy] admitted she had more cocaine in her "bra."

11. After Miranda and arrest, additional cocaine was recovered from [Ms. Kinzy's] "bra" when she was searched by Officer Kim at the SPD West Precinct.

II. REASONS FOR THE ADMISSIBILITY OF THE EVIDENCE SOUGHT TO BE SUPPRESSED:

1. The court finds that the Officers had a reasonable basis for approaching and questioning [Ms. Kinzy] to determine her age and whether she [sic] a youth at risk.

2. The court finds that due to [Ms. Kinzy's] perceived height of 4'9" (verified as 5'1" at fact finding), perceived age of between 11 and 13, the late hour, her presence in a high narcotics area, the fact that she was in the company of a person associated with narcotics, all added to provide the officers with proper grounds to approach [Ms. Kinzy] as a youth at risk.

3. The court finds that due to her furtive movements, bulky clothing and refusal to keep her hands in view, there was a reasonable

and grounded concern for officer safety which prompts and justifies a pat-down for weapons.

4. The court finds that Officer Jennings acted reasonably when he requested [Ms. Kinzy] to keep her jacket open so he could see where her hands were.

5. The court finds that the Officers were lawfully engaging [Ms. Kinzy] based on their concerns for her safety as a potential youth at risk.

6. The court finds that [O]fficer Jennings saw, in plain view, what he thought to be particles of rock cocaine on the black lining of [Ms. Kinzy's] coat.

7. The court finds that Officer Jennings could differentiate between the suspected narcotics and other items such as lint or food crumbs because of his experience, both on the street and formal training, in the area of narcotics.

8. Relevant factors considered by the court, were taken in light of the circumstances at hand and the officers [sic] training and experience.

9. The court finds the testimony of the officers credible.

In addition to the above-written findings and conclusions, the Court incorporates by reference its oral findings and conclusions.[6]

Officer M.B. Jennings testified on direct and cross examination consistent with the written findings of fact:

A. I approached and we stopped and said, you know: Could you come here. She ignored us. We talked directly to her and said, you

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[6] Petitioner's motion to suppress evidence was denied on May 7, 1998. Respondent then prepared a document captioned "Written Findings of Fact and Conclusions of Law to Comply with CrR 3.6," which the trial court signed on July 30, 1998. Respondent filed the document with the King County Superior Court under an erroneous cause number. Because of this error, Respondent filed a motion with this Court to supplement Clerk's Papers with the document. The motion was granted on December 9, 1999.

know: Young lady, could you please stop and come here. And she kept her hand [sic] down with her hands in her pockets and attempted to walk away. The rest of the group stopped. She was the only one that continued to walk away from us.

. . . .

Q. Did she ever stop walking?

A. *We actually had to hold her arm to stop her from walking.*

Q. Well, what did you ask her, what questions?

A. At that point we wanted to identify her. She looked young. We wanted to find out how old she was and to do a check for her safety and question her why she was downtown, what her purpose was, who she was with, was she with family, was she by herself, does she know these people, those kind of questions.

Q. *Did you have any suspicions of drug activity regarding her?*

A. *Regarding her, no. We stopped her for her safety.*

. . . .

Q. *So your initial reason for contacting Loreal was not because you suspected her of any criminal activity; is that correct?*

A. *That's correct.*

. . . .

Q. *If she were to say to you: I'm 16, I'm fine, I don't need your help, would that have been sufficient for you to let her go?*

A. *No.*

Q. *So you wanted very specific details about her plans?*

> A. *No, I wanted proof of her age. Because of her visual appearance, she did not look to be 16 years old.*[7]

After hearing further testimony, Judge Tuai on May 7, 1998 found Petitioner "guilty" of violation of the Uniform Controlled Substances Act under RCW 69.50.401(d).[8] During a disposition hearing on June 4, 1998, the Honorable Deborah D. Fleck imposed upon Petitioner a "manifest injustice" sentence of 32 weeks.[9] Petitioner on that date filed a notice of appeal to the Court of Appeals, Division I.[10]

The Court of Appeals, Division I, the Honorable Susan R. Agid writing, in a majority opinion affirmed Petitioner's conviction and the order denying her motion to suppress evidence of cocaine.[11] Petitioner claimed the cocaine was the fruit of an illegal search and seizure.[12] The court disagreed and concluded that (1) the initial "seizure" of Petitioner was reasonable under the "community caretaking function" exception to the warrant requirement, (2) the protective frisk of Petitioner was valid under *Terry v. Ohio*[13]

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[7] Report of Proceedings at 15-16, 25, 30, May 7, 1998 (emphasis added).

[8] Hearings, Findings and Decision on Information, Clerk's Papers at 6; Report of Proceedings at 103, May 7, 1998.

[9] Order of Disposition, Clerk's Papers at 9; Report of Proceedings at 28, June 4, 1998; *see also* RCW 13.40.160(2).

[10] Clerk's Papers at 10.

[11] *State v. L.K.*, 95 Wn. App. at 697.

[12] Br. of Appellant at 18.

[13] 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

and (3) the plain view observation and simultaneous "seizure" of cocaine flecks was valid under the "plain view" exception to the warrant requirement.[14]

Petitioner then sought review in this Court. *In her supplemental brief and petition for review, she raised only the issue of the validity of her "seizure" under the community caretaking function exception.*[15] Review was granted on November 2, 1999.[16]

DISCUSSION

STANDARD OF REVIEW

On May 7, 1998, Petitioner filed in the King County Superior Court, Juvenile Division, a motion to suppress evidence of cocaine. The court denied the motion and on July 30, 1998 signed findings of fact and conclusions of law to comply with CrR 3.6. "[I]n reviewing findings of fact entered under a motion to suppress, [this Court] will review only those facts to which error has been assigned."[17] Petitioner did not challenge the findings of fact on appeal to this Court.[18] We must then treat them as verities.[19]

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[14] *State v. L.K.*, 95 Wn. App. at 694-97.

[15] *Compare* Pet. for Review at 1 *with* Supplemental Br. of Pet'r at 1-17.

[16] Order Granting Discretionary Review.

[17] *State v. Hill*, 123 Wn.2d 641, 647, 870 P.2d 313 (1994).

[18] *See* Supplemental Br. of Pet'r.

[19] *See State v. Hill*, 123 Wn.2d at 644.

The findings of fact provide a chronology of five significant events on March 3, 1998, the date of Petitioner's arrest. First, Seattle Police Officers M.B. Jennings and D.K. Kim observed Petitioner in company with several others at 10:10 p.m., decided to approach her and then "hailed" her.[20] The record does not indicate the actual time of following events, but it is clear they followed instantaneously in sequence immediately after 10:10 p.m. Second, Officer Jennings grabbed Petitioner's arm as she began to walk away.[21] Third, he patted Petitioner down for weapons.[22] Fourth, Officer Jennings noticed cocaine flecks on Petitioner's coat and removed them for field testing.[23] Fifth, Petitioner "admitted" she had more cocaine in her brassière after "the field test came back positive for cocaine."[24]

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[20] Findings of Fact and Conclusions of Law to Comply with CrR 3.6, Findings of Fact 1, 2, 8 and 9.

[21] *Id.* Finding of Fact 2.

[22] *Id.* Findings of Fact 2 and 3.

[23] *Id.* Findings of Fact 4, 5, 6 and 7.

[24] *Id.* Findings of Fact 10 and 11.

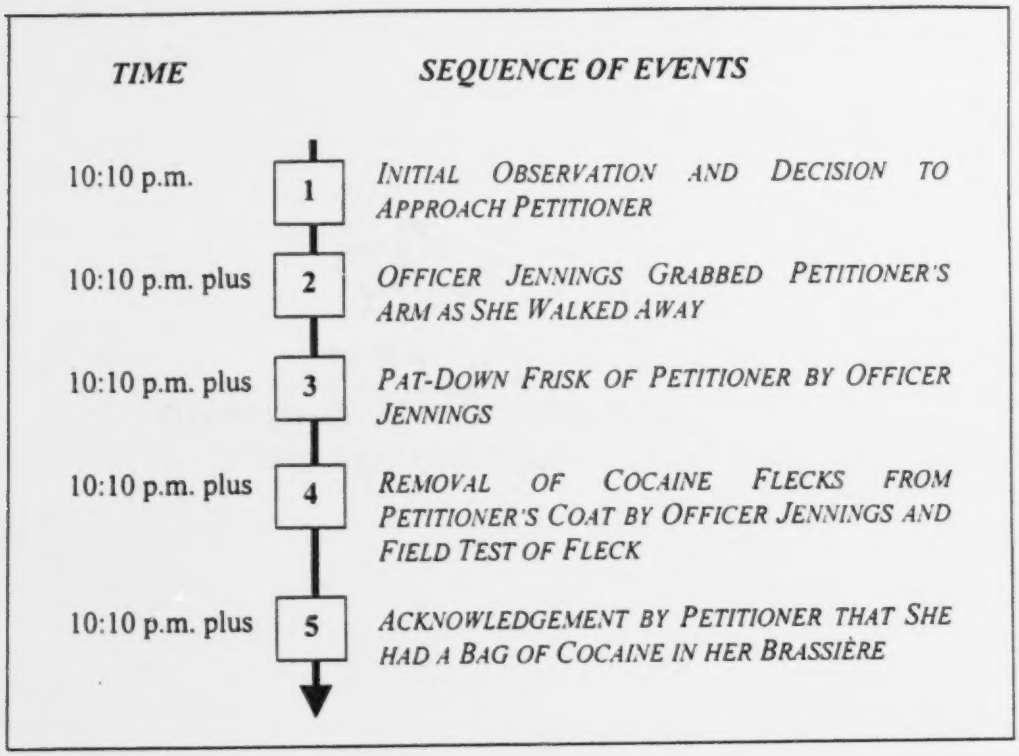

Figure 1. Sequence of Events

Petitioner does not challenge the validity of the pat-down frisk, which the Court of Appeals concluded was reasonably "based on 'specific and articulable facts' . . . that [Petitioner was] 'armed and presently dangerous.'"[25] Neither does she challenge the removal of cocaine flecks, which the Court of Appeals concluded came within the simultaneous "plain view" exception to the warrant requirement.[26] Nor does she

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[25] *Compare* Supplemental Br. of Pet'r *with* Br. of Appellant at 18-23; *State v. L.K.*, 95 Wn. App. at 695-96.

[26] *Compare* Supplemental Br. of Pet'r *with* Br. of Appellant at 23-24; *State v. L.K.*, 95 Wn. App. at 697.

challenge the validity of her admission concerning the bag of cocaine in her brassière.[27] Petitioner instead relies solely upon the "fruit of the poisonous tree" doctrine.[28] She claims the sequence of events beginning with the officer grabbing her arm were unconstitutional and thus tainted everything that followed, including especially "seizure" of the bag of cocaine from her brassière.[29]

FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION

"As a general rule, warrantless searches and seizures are per se unreasonable" under the Fourth Amendment to the United States Constitution.[30] "Nonetheless, there are a few jealously and carefully drawn exceptions to the warrant requirement which provide for those cases where the societal costs of obtaining a warrant . . . outweigh the reasons for prior recourse to a neutral magistrate."[31] The State bears the burden of showing a seizure without a warrant falls within one of these exceptions.[32]

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[27] See Supplemental Br. of Pet'r.

[28] *Id.* at 3 (citing *State v. Kennedy*, 107 Wn.2d 1, 4, 726 P.2d 445 (1986) and *Wong Sun v. United States*, 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963)).

[29] *Id.*

[30] *State v. Houser*, 95 Wn.2d 143, 149, 622 P.2d 1218 (1980) (citing *Coolidge v. New Hampshire*, 403 U.S. 443, 91 S. Ct. 2022, 29 L. Ed. 2d 564 (1971)).

[31] *Id.* (citing *Arkansas v. Sanders*, 442 U.S. 753, 759, 99 S. Ct. 2586, 61 L. Ed. 2d 235 (1979)) (internal quotations omitted).

[32] *Id.*

The sole issue before this Court involves the further question whether one of these carefully drawn exceptions applies to the two events occurring prior to the pat-down frisk.[33] Under *Terry v. Ohio*, police officers need not have a warrant to "stop" a suspect if they have "a reasonable, articulable suspicion that criminal activity is afoot."[34]

In this case, the findings of fact do not support justification for a *Terry* stop because the first two sequential events of March 3, 1998 provide no indication of criminal activity by Petitioner. Indeed, Officer Jennings testified his reason for initiating contact with Petitioner was simply concern for her safety and not suspicion of criminal activity.[35] Because Respondent State of Washington cannot establish a valid *Terry* stop, it relies instead upon the "community caretaking function" exception to the warrant requirement.

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[33] Petitioner also raised an issue concerning the validity of her seizure under article I, section 7 of the Washington Constitution. Pet. for Review at 1. However, she presented no arguments on this issue other than merely stating: "This Court has consistently held that article I, § 7 of the Washington Constitution is especially protective of an individual's right to privacy." Supplemental Br. of Pet'r at 2-3 n.2 (citing *State v. Parker*, 139 Wn.2d 486, 987 P.2d 73 (1999) and *State v. Ladson*, 138 Wn.2d 343, 356-57, 979 P.2d 833 (1999)). This Court will not address constitutional issues not supported by adequate briefing. *State v. Hill*, 123 Wn.2d at 648.

[34] *Illinois v. Wardlow*, 120 S. Ct. 673, 675 (2000).

[35] Report of Proceedings at 25, May 7, 1998.

"COMMUNITY CARETAKING FUNCTION" EXCEPTION

The community caretaking function exception was first announced in *Cady v. Dombrowski*, which observed with respect to the Fourth Amendment of the United States Constitution that

> Local police officers, unlike federal officers, frequently investigate vehicle accidents in which there is no claim of criminal liability and engage in what, for want of a better term, may be described as *community caretaking functions, totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute.*[36]

As noted in *Cady*, the community caretaking function exception is totally divorced from a criminal investigation.[37]

This Court first cited *Cady* in *State v. Houser*, a 1980 case involving impoundment of an automobile.[38] Subsequent Washington cases have expanded the community caretaking function exception to encompass not only the "search and seizure"

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[36] 413 U.S. 433, 441, 93 S. Ct. 2523, 37 L. Ed. 2d 706 (1973) (emphasis added).

[37] *See State v. Houser*, 95 Wn.2d at 151.

[38] *Id.* at 151. While countenancing the community caretaking function exception announced in *Cady*, this Court has not *explicitly* stated the exception applies to article I, section 7 of the Washington Constitution. *Cf. State v. Ladson*, 138 Wn.2d at 356-57 (characterizing *State v. Houser* as "an article I, section 7, case" which "explained that the police may validly exercise the community caretaking function of removing an abandoned vehicle but may not use that authority as a pretext to conduct unrelated criminal investigation."). In *Ladson*, this Court correctly explained the holding of *State v. Houser*, but somewhat mischaracterized it as "an article I, section 7, case." In *Houser*, all citations concerning the community caretaking function exception refer to federal cases interpreting the Fourth Amendment to the United States Constitution and not to article I, section 7 of the Washington Constitution.

of automobiles, but also situations involving either emergency aid[39] or routine checks on health and safety.[40] Both situations may require police officers to render aid or assistance.[41] But compared with routine checks on health and safety, the emergency aid function involves circumstances of greater urgency and searches resulting in greater intrusion.[42] It applies when "(1) the officer subjectively believed that someone likely needed assistance for health or safety reasons; (2) a reasonable person in the same situation would similarly believe that there was a need for assistance; and (3) there was a reasonable basis to associate the need for assistance with the place searched."[43]

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[39] *See, e.g., State v. Loewen*, 97 Wn.2d 562, 567-68, 647 P.2d 489 (1982); *State v. Angelos*, 86 Wn. App. 253, 255-56, 936 P.2d 52 (1997) (Division I), *review denied*, 133 Wn.2d 1034, 950 P.2d 478 (1998). The emergency aid doctrine is different from the "exigent circumstances" exception to the warrant requirement. Both involve situations in which police officers must act immediately, but for distinctly different purposes. Unlike the exigent circumstances exception, "the emergency [aid] doctrine does not involve officers investigating a crime but arises from a police officer's community caretaking responsibility to come to the aid of persons believed to be in danger of death or physical harm." *State v. Leupp*, 96 Wn. App. 324, 330, 980 P.2d 765 (1999) (Division II).

[40] *See, e.g., State v. Villarreal*, 97 Wn. App. 636, 643-44, 984 P.2d 1064 (1999) (Division III) (community caretaking function exception applied to stop and identification inquiry of defendant found urinating in public).

[41] *State v. Hutchison*, 56 Wn. App. 863, 865, 785 P.2d 1154 (1990) (Division II).

[42] Mary Elisabeth Naumann, Note, *The Community Caretaker Doctrine: Yet Another Fourth Amendment Exception*, 26 AM. J. CRIM. L. 325, 333-34 (1999); *compare State v. Dempsey*, 88 Wn. App. 918, 947 P.2d 265 (1997) (Division III) (search did not exceed scope of emergency involuntary civil commitment) *with State v. Villarreal*, 97 Wn. App. at 643-44.

[43] *State v. Menz*, 75 Wn. App. 351, 354, 880 P.2d 48 (1994) (Division II), *review denied*, 125 Wn.2d 1021, 890 P.2d 463 (1995).

The community caretaking function exception recognizes that a person may encounter police officers in situations involving not only emergency aid, but also involving a routine check on health and safety. In *Kalmas v. Wagner*, this Court concluded the exception applied when one of the parties "called 911 asking for police assistance."[44] Under a routine check on safety, "[w]hether an encounter made for noncriminal, noninvestigatory purposes is reasonable depends on a balancing of the individual's interest in freedom from police interference against the public's interest in having the police perform a 'community caretaking function.'"[45]

Because this Court has not rendered any pertinent decision directly applicable to the principal issue in this case, we may consider some decisions of the Court of Appeals. If a person has not been "seized," balancing the interests usually results in favoring the action by police. The person's interest in being free from police intrusion is "minimal" in the absence of a "seizure."[46] In contrast, "[m]any citizens look to the police to assist them in a variety of circumstances, including delivering emergency messages, giving directions, searching for lost children, assisting stranded motorists, and

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[44] 133 Wn.2d 210, 216-17, 943 P.2d 1369 (1997).

[45] *Id.*

[46] *State v. Markgraf*, 59 Wn. App. 509, 512, 798 P.2d 1180 (1990) (Division III).

rendering first aid."[47] Considering the public's interest in having police officers perform community caretaking functions, "police officers must be able to approach citizens and *permissively* inquire as to whether they will answer questions."[48]

When a person has been seized, balancing the interests does not necessarily favor an encounter by police. "A person is 'seized' within the meaning of the Fourth Amendment of the United States Constitution only when restrained by means of physical force or a show of authority."[49] The relevant inquiry is whether totality of the circumstances indicate "a reasonable person would have felt free to leave or otherwise decline the officer's requests and terminate the encounter."[50] Consistent with this inquiry, a citizen's interest in being free from police intrusion is no longer minimal once there is a seizure. When weighing the public's interest, this Court must cautiously apply the community caretaking function exception because of "a real risk of abuse in allowing

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[47] *Hudson v. City of Wenatchee*, 94 Wn. App. 990, 996, 974 P.2d 342 (1999) (Division III).

[48] *State v. Nettles*, 70 Wn. App. 706, 712, 855 P.2d 699 (1993) (Division I), *review denied*, 123 Wn.2d 1010, 869 P.2d 1085 (1994) (emphasis added).

[49] *State v. Thorn*, 129 Wn.2d 347, 351-52, 917 P.2d 108 (1996) (citing *United States v. Mendenhall*, 446 U.S. 544, 100 S. Ct. 1870, 64 L. Ed. 2d 497 (1980)).

[50] *Id.* at 352 (citing *Florida v. Bostick*, 501 U.S. 429, 436, 111 S. Ct. 2382, 115 L. Ed. 2d 389 (1991)).

even well-intentioned stops to assist."[51] Once the exception does apply, police officers may conduct a noncriminal investigation so long as it is necessary and strictly relevant to performance of the community caretaking function.[52] The noncriminal investigation must end when reasons for initiating an encounter are fully dispelled.[53]

In this case, the first event at 10:10 p.m. was the starting point of a pre-seizure encounter, albeit a brief one. Officers Jennings and Kim observed Petitioner, decided to approach her and then hailed her. Their decision, based on good intentions, was supported by (1) their perception and erroneous belief that Petitioner was between the ages of 11 and 13; (2) the late hour of 10:10 p.m. on Tuesday, March 3, 1998; (3) her presence in a high narcotics trafficking area on the corner of Third Avenue and Stewart Street in downtown Seattle; and (4) the fact she was in the company of several persons, including one adult male person known by the officers to be associated with narcotics.

The officers testified the encounter was initiated by their concern for Petitioner's safety as a potential youth at risk. The public interest without question

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[51] *State v. DeArman*, 54 Wn. App. 621, 626, 774 P.2d 1247 (1989) (Division I) (citing *United States v. Dunbar*, 470 F. Supp. 704, 708 (D. Conn. 1979), *aff'd*, 610 F.2d 807 (2d Cir. 1979)); *State v. Hutchison*, 56 Wn. App. at 866 (Division II).

[52] *See State v. Gleason*, 70 Wn. App. 13, 17-18, 851 P.2d 731 (1993) (Division III); *State v. Markgraf*, 59 Wn. App. at 513 (Division III) ("The purpose of the stop must be related to an investigation focused on the detainee.").

[53] *State v. DeArman*, 54 Wn. App. at 626-27 (Division I); *see State v. Houser*, 95 Wn.2d at 155 ("As a further protection against abuse, the scope of the search should be limited to those areas necessary to fulfill its purpose.").

comports with increasing the safety of children, especially those considered "at-risk youth."[54]

The record does not support justification for detaining Petitioner under the Family Reconciliation Act[55] which clearly is designed to promote the public interest in the safety of children. In addition, rendering aid or assistance through a health and safety check is a hallmark of the community caretaking function exception. Otherwise a police "officer could be considered derelict by *not* acting promptly to ascertain if someone needed help."[56] In contrast, Petitioner's interest in freedom from police intrusion was minimal as long as there was no seizure. Balancing the interests indicates the pre-seizure encounter was reasonable and justified under the community caretaking function exception.

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[54] RCW 13.32A.010. "'At-risk youth' means a juvenile: (a) Who is absent from home for at least seventy-two consecutive hours without consent of his or her parent; (b) Who is beyond the control of his or her parents such that the child's behavior endangers the health, safety, or welfare of the child or any other person; or (c) Who has a substance abuse problem for which there are no pending criminal charges related to the substance abuse." RCW 13.32A.030(2). A child is an "unemancipated individual who is under the chronological age of eighteen years." RCW 13.32A.030(3).

[55] Chapter 13.32A RCW

[56] *State v. Gocken*, 71 Wn. App. 267, 276, 857 P.2d 1074 (1993) (Division I), *review denied*, 123 Wn.2d 1024, 875 P.2d 635 (1994).

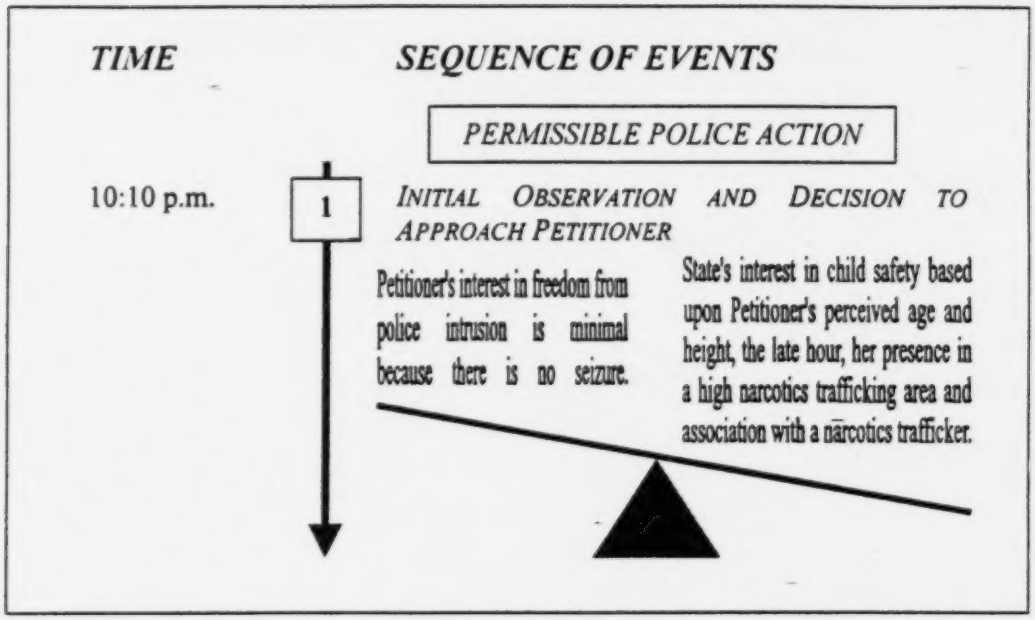

Figure 2. Permissible Police Action

Petitioner, however, did not welcome the pre-seizure encounter with police officers. She began to walk away. The officers not then suspecting she had committed a crime, Petitioner should have been able to walk away and terminate the encounter.[57] She instead "was restrained by the officers."[58] This restraint initially might conceivably be considered a continuation of the previous event of observing Petitioner and deciding to

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[57] *See State v. Thorn*, 129 Wn.2d at 352; *see also State v. Menneger*, 114 Wn.2d 304, 313, 787 P.2d 1347 (1990) ("When the officer asked the passenger for his driver's license, the passenger was free to refuse. He also was free to refuse the invitation to drive his intoxicated companion's vehicle.").

[58] Written Findings of Fact and Conclusions of Law to Comply with CrR 3.6 at 1-2.

approach her. The balancing test nonetheless must be applied again because there was a change in Petitioner's interest in freedom from police intrusion.

The second event—the officer grabbing Petitioner by the arm—raised the encounter to the level of a "seizure" without a warrant.[59] Her interest in being free from police intrusion was no longer minimal. Officer Jennings testified he "wanted to find out how old [Petitioner] was . . . and question her why she was downtown, what her purpose was, who she was with, was she with family, was she by herself, does she know these people . . . ."[60] When asked her age, Petitioner truthfully told the officers she was 16 years old. Her honest answer was met with momentary disbelief and further police intrusion by demand for identification and proof of age. Officer Jennings testified he would not have released Petitioner even though she said she was 16 and even if she had said she was not in need of help.

Counterbalancing Petitioner's substantial interest in freedom from police intrusion is the public's interest in the safety of children. When weighing the public's interest, this Court must cautiously apply the community caretaking function exception because of the potential for abuse. The findings of fact indicate the police officers relied upon the following subjective and objective facts: (1) Petitioner's perceived age of between 11 and 13; (2) the late hour beyond 10:10 p.m. on Tuesday, March 3, 1998; (3) her presence in a high narcotics area on the corner of Third Avenue and Stewart Street in

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[59] *See State v. L.K.*, 95 Wn. App. at 691.

[60] Report of Proceedings at 16, May 7, 1998.

downtown Seattle; and (4) the fact she was in the company of a person known by the officers to be associated with narcotics. The actions by the officers were suggestive of enforcement of a juvenile curfew law. But Seattle does not have such a law.

It is at least subject to question whether juvenile curfew laws impermissibly infringe upon a minor's constitutional freedoms of association, expression and movement.[61] Consideration of these freedoms in this case, after cautious application of the community caretaking function exception, leads us to conclude the seizure of Petitioner Kinzy by the officers and their actions which followed was unreasonable. Respondent's interest in maintaining the safety of children did not outweigh Petitioner's constitutional interests in freedom of association, expression and movement.

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[61] *See State v. Pullman,* 82 Wn.2d 794, 795 n.1, 514 P.2d 1059 (1973); *See State v. J. D.*, 86 Wn. App. 501, 511, 937 P.2d 630 (1997), *review granted,* 134 Wn.2d 1006, 954 P.2d 277 (1998). This Court initially granted review but then dismissed it as improvidently granted on May 12, 1998.

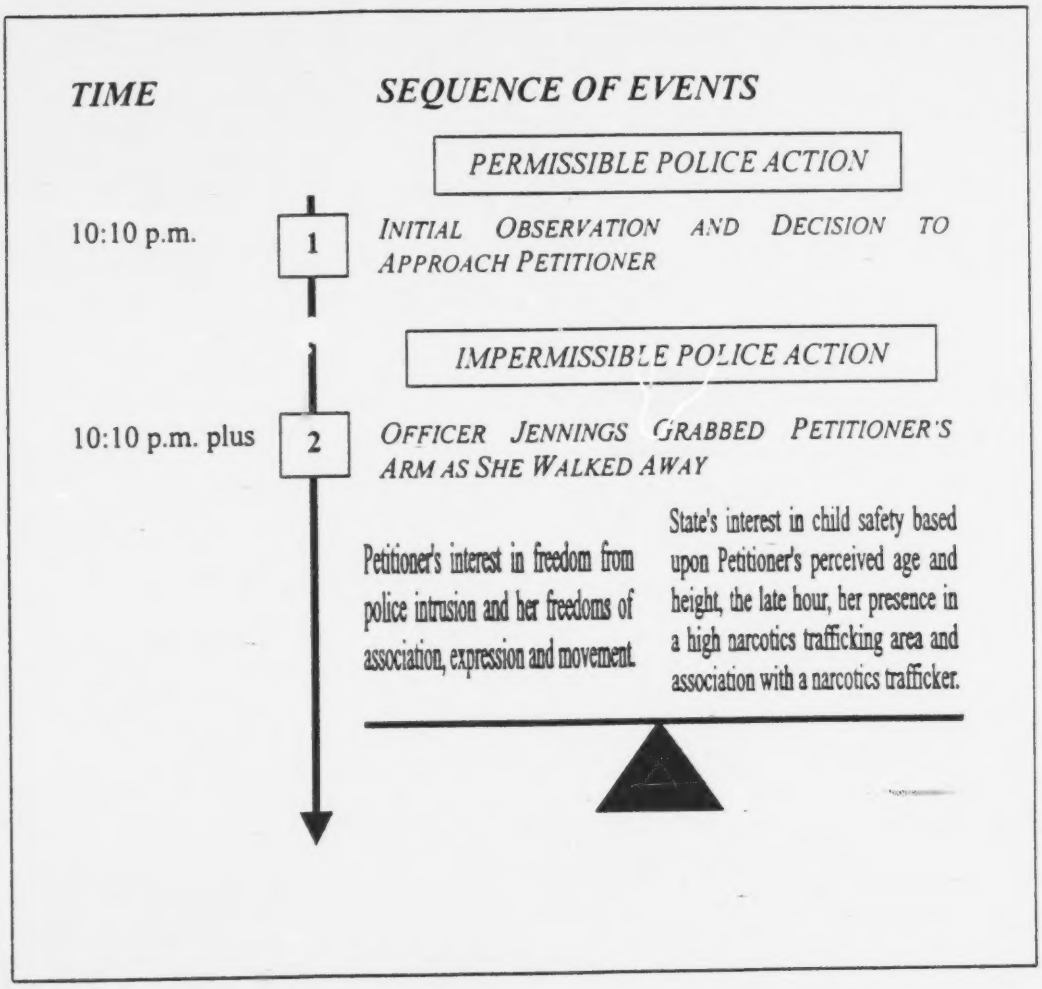

Figure 3. Impermissible Police Action

When the judicial scales are used to balance the governmental interest against a citizen's privacy interest in freedom from police intrusion and freedoms of association, expression and movement, "the balance ought to be struck on the side of privacy" because "[t]he policy of the Fourth Amendment is to minimize governmental

confrontations with the individual."[62] Respondent State of Washington has argued that striking the balance in favor of Petitioner in this case "would insulate criminals who prey upon children by involving them in prostitution, sexual exploitation and narcotics trafficking."[63] However, the Fourth Amendment will not foster this parade of horribles so long as police officers have a reasonable, articulable suspicion of criminal activity before undertaking a stop which leads to detention, search and seizure.[64]

MOTION TO SUPPRESS

"When an unconstitutional search or seizure occurs, all subsequently uncovered evidence becomes fruit of the poisonous tree and must be suppressed."[65] In this case, evidence of cocaine was discovered only after (1) seizure of Petitioner, (2) the pat-down frisk of Petitioner, (3) the seizure of cocaine flecks and (4) Petitioner's admission that she had more cocaine in her "bra." Petitioner correctly claims before this Court that her seizure by Respondent was unconstitutional, and thus the subsequently discovered cocaine became the "fruit of the poisonous tree." The trial court should have granted Petitioner's motion to suppress.

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[62] *Id.*

[63] *State v. L.K.*, 95 Wn. App. at 695.

[64] *See Terry v. Ohio*, 392 U.S. at 30.

[65] *State v. Ladson*, 138 Wn.2d at 359.

CONVICTION UNDER RCW 69.50.401(d)

RCW 69.50.401(d) provides:

> It is unlawful for any person to possess a controlled substance unless the substance was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of his or her professional practice, or except as otherwise authorized by this chapter. Any person who violates this subsection is guilty of a crime, and upon conviction may be imprisoned for not more than five years, fined not more than ten thousand dollars, or both, except as provided for in subsection (e) of this section.

Conviction under RCW 69.50.401(d) requires possession of a "controlled substance," which by statutory definition includes cocaine.[66] Our decision which concludes Petitioner's motion to suppress evidence of cocaine should have been granted thus eliminates the sole basis for her conviction.

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[66] RCW 69.50.101(d) (defining "controlled substance" as "a drug, substance, or immediate precursor included in Schedules I through V as set forth in federal or state laws, or federal or board rules"); RCW 69.50.206(b)(5) (listing "[m]ethylbenzoylecgonine (cocaine—its salts, optical isomers, and salts of optical isomers)" under Schedule II).

SUMMARY AND CONCLUSION

Under the Fourth Amendment to the United States Constitution, a "seizure" by police officers without a warrant is *per se* unreasonable. One exception to the warrant requirement arises when police are serving in their role as community caretakers. The community caretaking function exception may not be used as a pretext for a criminal investigation. It normally applies to police encounters involving emergency aid and routine checks on health and safety.

Where, as in this case, an encounter involves a routine check on health and safety, its reasonableness depends upon a balancing of a citizen's privacy interest in freedom from police intrusion against the public's interest in having police perform a "community caretaking function." A person's interest in freedom from police intrusion increases when an encounter is elevated to the level of a "seizure." When a person has not been seized, balancing the interests usually favors the action by police. Police officers must be able to approach citizens and permissively inquire whether they will answer questions. This intrusion is minimal and reasonable in light of citizens' expectations that police will assist them in a variety of circumstances.

When a person is seized, however, the intrusion no longer remains minimal. Balancing the interests will not necessarily favor action by police. When in doubt, the balance should be struck on the side of privacy because the policy of the Fourth Amendment is to minimize governmental intrusion into the lives of citizens. The community caretaking function exception should be cautiously applied because of its

potential for abuse. Once the exception does apply, police may conduct a noncriminal investigation so long as it is necessary and strictly relevant to performance of the community caretaking function. The noncriminal investigation must end when reasons for initiating an encounter have been fully dispelled.

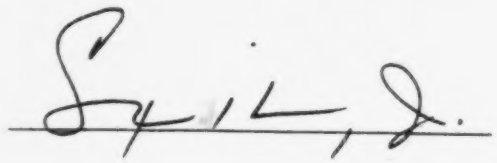
In this case, the findings of fact reveal two significant events on March 3, 1998: (1) police observation of Petitioner and the decision to approach her at 10:10 p.m. and (2) Officer Jennings' restraint of Petitioner as she began to walk away.

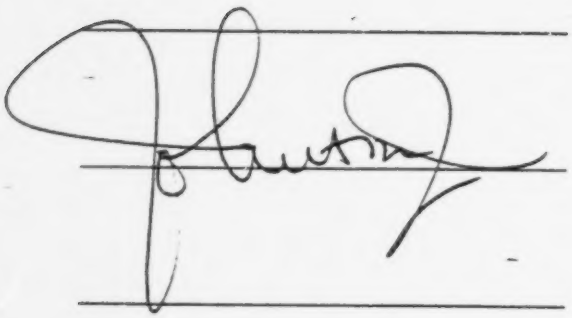
The first event was the starting point for a pre-seizure encounter, albeit a brief one. Balancing the interests leads to a conclusion that that encounter was reasonable. Petitioner's privacy interest in being free from police intrusion was minimal as long as there was no "seizure." Rendering aid or assistance through a health or safety check is a hallmark of the community caretaking function exception. Under the second event, the police officers had no articulable suspicion that Peitioner had committed a criminal offense. She was entitled to walk away and terminate the encounter with the police officers. Petitioner chose to walk away from the two police officers. Officer Jennings grabbed Petitioner by her arm, thus elevating the encounter to a constitutional seizure. After this, Petitioner's privacy interest in being free from police interference was no longer minimal. The officer was no longer permissively inquiring whether Petitioner would answer questions. Petitioner was compelled to answer questions to the satisfaction of the police officers. Otherwise, they would not have allowed her to leave, even when she answered their questions truthfully. In addition, Respondent's detention of Petitioner was based upon facts which suggested imposition of a juvenile curfew law. Seattle has

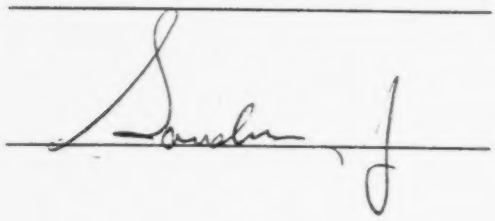
no such law. Curfew laws have not been favored because of criticism they impermissibly infringe upon a citizen's constitutional freedoms of association, expression and movement. Cautious application of the community caretaking function exception leads to our conclusion that the post-seizure action by the officers against Petitioner was unreasonable. Respondent's interest in protecting the safety of children did not outweigh Petitioner's interest in her constitutional freedoms of association, expression and movement.

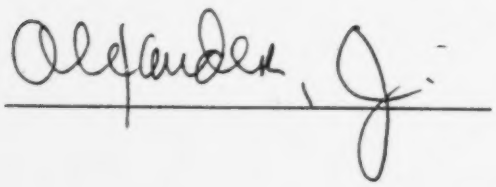
The community caretaking function exception did not justify seizure of Petitioner by Respondent. Under these circumstances, this was an unconstitutional seizure which tainted all police activity which followed. The trial court should have granted Petitioner's motion to suppress evidence. With suppression of the cocaine, there would be no evidence to support the charged criminal offense under RCW 69.50.401(d).

We reverse the decision of the Court of Appeals, Division I, which affirmed both the conviction of Petitioner Loreal Monique Kinzy and the order of the King County Superior Court denying her motion to suppress.









State v. L. K.
Majority by Smith, J.
Concurrence by Madsen, J.

No. 68239-9

MADSEN, J. (concurring) -- I agree with the majority that the seizure here was an unlawful detention. I also agree with Judge Baker's dissent that applying the community caretaking exception in this case would expand the exception far beyond it limits. *State v. L.K.*, 95 Wn. App. 686, 697, 977 P.2d 39 (1999) (Baker, J., dissenting). Moreover, because this exception defies precise definition, its potential for abuse is high.

The police were justified in their initial contact with L.K. if they were legitimately attempting to determine if she was in need of assistance, but once they determined that she was not, their contact should have ended. The community caretaking function exception serves as a vehicle allowing police to check on persons who appear to be in need of aid. She did not appear to be in distress or in need of medical aid, and, despite her

proximity to an area where drug trafficking occurred and to an individual with a history of drug involvement, there was no evidence of any drug activity at the time the police approached. *See, e.g., State v. Hutchison*, 56 Wn. App. 863, 867, 785 P.2d 1154 (1990) (police properly searched for the identification of a man they found passed out in a parking lot); *Gallegos v. City of Colorado Springs*, 114 F.3d 1024, 1029 n.4 (10th Cir. 1997) (police properly stopped a distraught man who was crying, smelled of alcohol, and had his hands over his face as he walked down a street late at night).

Also, although I agree that the community caretaking function is a valid exception, the majority unfortunately states that abuse of the exception will not occur "so long as police officers have a reasonable, articulable suspicion of criminal activity before undertaking a stop which leads to detention search, and arrest." Majority at 23. If the exception for community caretaking applies in a given case, it will allow the police to check on those appearing to be in need of aid without meeting the standards for a *Terry* stop. *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). In some cases, carrying out the community caretaking function will lead to detention, search, and arrest, such as in *Hutchison*, where the search for identification led to the discovery of controlled substances.

I concur in the majority.

Madsen, J.

State v. Kinzy
Majority by Smith, J.
Dissent by Talmadge, J.

No. 68239-9

TALMADGE, J. (dissenting) -- I dissent because the majority turns every encounter between the police and the public into a latent criminal investigation, thereby doing untold damage to law enforcement's traditional community caretaking function. As the majority would have it, police can no longer detain children at risk, runaways, mentally ill and intoxicated persons, and others in distress unless they have a warrant. Requiring a warrant before a person may be detained by police officers exercising their community caretaking responsibilities will have an immediate and devastating effect upon a variety of essential law enforcement functions necessary to preserve the social order and to aid those in harm's way. If no warrant can be obtained absent probable cause criminal activity occurred, police community caretaking will simply disappear except in

those fortuitous instances when criminal activity actually coincides with the need for community caretaking.

Modern law enforcement is *not* confined to criminal investigation. Police officers have numerous civil functions unrelated to criminal investigations, ranging from serving civil warrants to picking up runaway children to detaining mentally ill or intoxicated people for appropriate treatment. In fact, " 'Most police work involves noncriminal events. Order maintenance or peacekeeping activities comprise an estimated two-thirds of all calls to the police[.]' " SAMUEL WALKER, THE POLICE IN AMERICA 112 (McGraw Hill 2d ed. 1992), *quoted in* Debra Livingston, *Police Community Caretaking, and the Fourth Amendment*, 1998 U. CHI. LEGAL F. 261, 263 n.9. Professor LaFave made this point well when he wrote:

> The policeman, as a jack-of-all-emergencies has "complex and multiple tasks to perform in addition to identifying and apprehending persons committing serious criminal offenses"; by default or design he is expected to "aid individuals who are in danger of physical harm," "assist those who cannot care for themselves," and "to provide other services on an emergency basis." If a reasonable and good faith search is made of a person for such a purpose, then the better view is that evidence of crime discovered thereby is admissible in court.

3 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 5.4(c), at 163 (3d ed. 1996) (footnote omitted). Another commentator wrote:

> Communities have always looked to police to perform social services unrelated or at best partially related to enforcing criminal law. "Community caretaking" denotes a wide range of everyday police activities undertaken to aid those in danger of physical harm, to preserve property, or "to create and maintain a feeling of security in the community." It includes things like the mediation of noise

> disputes, the response to complaints about stray and injured animals, and the provision of assistance to the ill or injured. Police must frequently "care for those who cannot care for themselves: the destitute, the inebriated, the addicted . . . and the very young." They are often charged with taking lost property into their possession; they not infrequently see to the removal of abandoned property. In those place where social disorganization is at its highest, police are even called upon "to serve as surrogate parent or other relative, and to fill in for social workers, housing inspectors, attorneys, physicians, and psychiatrists." Community caretaking, then, is an essential part of the functioning of local police. It in fact occupies such a high proportion of police time that one can even question "the value of viewing the police primarily as a part of the criminal justice system."

Livingston, *supra*, at 271-72 (footnotes omitted).

The United States Supreme Court in *Cady v. Dombrowski*, 413 U.S. 433, 93 S. Ct. 2523, 37 L. Ed. 2d 706 (1973), first described the broad array of noncriminal, noninvestigative police duties as "community caretaking functions." In *Cady*, the Court noted: "Local police officers, unlike federal officers, frequently investigate vehicle accidents in which there is no claim of criminal liability and engage in what, for want of a better term, may be described as community caretaking functions, totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." *Cady*, 413 U.S. at 441.

The community caretaker function is a social responsibility demanded by communities of their police officers. People *want* police to assist at traffic accidents, handle emergencies, aid people in distress, and generally render assistance when needed. The law does not require a warrant for such activities

unless the police intend a search or an arrest, and community caretaking functions, by definition, do not fit into either category.[1] A criminal investigative purpose usually arises only by happenstance in these police-community contacts -- officers discover criminal conduct or contraband while providing service to the public. Of course, officers acting in their community caretaker role may not do so as a pretext for criminal investigation; should they use their community caretaking responsibilities as a pretext for a criminal investigation, any evidence so developed should be inadmissible. *See State v. DeArman*, 54 Wn. App. 621,

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[1] The majority makes no mention of how, if ever, the officers in this case could have procured a warrant if they had no probable cause to believe a criminal violation was taking place. As Professor Livingston says:

> [T]he probable-cause-and-warrant framework is often plainly inapposite to consideration of the reasonableness of community caretaking intrusions . . . .
>
> In many community caretaking contexts, however, the relevant question is not whether police have an adequate basis to believe they will find particular persons or things in a particular place. Instead, the question is whether they have sufficient reason to act. Thus, when police enter commercial premises inexplicably left open at night in order to secure the property, they are not looking for specific persons or things. They are performing an historically-anchored "watchman's" role. Lacking probable cause to search, however, or the ability to satisfy the particular description requirement of the Warrant Clause, police could not obtain a traditional judicial warrant to support their entry even if they sought one in advance.

Livingston, *supra*, at 274-75.

774 P.2d 1247 (1989); *State v. Markgraf*, 59 Wn. App. 509, 798 P.2d 1180 (1990).

Washington courts have long discussed the noncriminal, noninvestigative duties of law enforcement. Our cases may be properly divided into four distinct categories:[2] (1) those dealing with medical or other types of emergencies; (2) those dealing with automobile impoundments or inventories; (3) those dealing with a law enforcement officer's role as a preserver of public safety; and (4) those dealing with a statutory mandate requiring an officer's intervention. Washington case law on the community caretaking function of law enforcement officers is broad, as befits a flexible concept rooted in police officers' traditional community service role.

The very first Washington case to use the term "community caretaking" is instructive. In *State v. Lund*, 10 Wn. App. 709, 519 P.2d 1325 (1974), police stopped Lund's vehicle because it was making excessive noise. They discovered Lund was driving while his license was suspended and arrested him. While Lund was being patted down, he told police there was a loaded gun in his vehicle. The police decided to retrieve the gun for safekeeping because the car was parked

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[2] *See generally*, Mary Elizabeth Naumann, *The Community Caretaker Doctrine: Yet Another Fourth Amendment Exception*, 26 AM. J. CRIM. L. 330 (1999).

along a street traversed by school children and the car could not be safely locked. In retrieving the gun from the car, the police discovered a canister of marijuana, which they seized and was later admitted into evidence. On appeal, Lund challenged the legality of the search of his car.

The Court of Appeals relied on the community caretaking doctrine in holding the search was legal. Because it was within the public safety function of the police to remove the gun from the vehicle, and since they were performing a lawful function when they discovered the marijuana, the marijuana was properly admitted into evidence at Lund's trial. *Id.* at 712.[3] This case fits into either the vehicle impoundment/inventory category or the public safety category of the community caretaking doctrine.

In a subsequent case, the Court of Appeals held an inventory search of a car reasonably impounded comes under the community caretaking doctrine, stating:

> Such warrantless inventory searches, when not intended to discover evidence of a crime, have been justified by the "benign purposes" of protection of public safety, protection of the driver's property, protection of the police from danger or from liability for claimed thefts, or protection of temporary storage bailees against false charges.

[3] This search appears to have been equally justifiable as a search incident to arrest, but the Court of Appeals did not discuss it.

State v. Hardman, 17 Wn. App. 910, 912, 567 P.2d 238 (1977) (citing *South Dakota v. Opperman*, 428 U.S. 364, 367, 96 S. Ct. 3092, 49 L. Ed. 2d 1000 (1976)), *review denied*, 89 Wn.2d 1020 (1978).[4]

In *State v. Chisholm*, 39 Wn. App. 864, 696 P.2d 41 (1985), officers stopped a vehicle to warn defendant his hat was in jeopardy of blowing out of the bed of his pickup truck. When one officer approached the cab of the truck, he noticed an open can of beer between the driver and passenger. Knowing both driver and passenger to be minors, the officer arrested them, and in the search incident to arrest, discovered marijuana. The trial court suppressed the evidence of marijuana, holding the stop of the truck was improper because there was no evidence of criminal activity. The Court of Appeals reversed in a well-reasoned opinion by Judge Reed that is worth quoting at length:

> First, we note that a vehicle stop, even for a benign purpose, must be made in harmony with the Fourth Amendment proscription against unreasonable searches and seizures. *Delaware v. Prouse*, 440 U.S. 648, 59 L. Ed. 2d 660, 99 S. Ct. 1391 (1979). Whether a given stop is unreasonable "depends on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers." *United States v. Brignoni-Ponce*, 422 U.S. 873, 878, 45 L. Ed. 2d 607, 95 S. Ct. 2574 (1975). *See also Camara v. Municipal Court*, 387 U.S. 523, 18 L. Ed. 2d 930, 87 S. Ct. 1727 (1967).

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[4] At one time, the Court of Appeals actually limited the community caretaking doctrine to automobiles. *See, e.g., State v. Grundy*, 25 Wn. App. 411, 417, 607 P.2d 1235 (1980), *review denied*, 95 Wn.2d 1008 (1981). This is no longer true.

Ordinarily, the balance between public and individual interests is accurately measured by the presence or absence of "probable cause." On occasion, the less demanding "reasonable suspicion" standard is employed. Here, the trial court concluded that the absence of reasonable suspicion to believe criminal activity was afoot rendered the stop unlawful. We disagree. Neither "probable cause" nor "reasonable suspicion" is an appropriate yardstick where the stop was made for noncriminal, noninvestigatory purposes. In that context, whether a particular stop is *reasonable* depends not on the presence or absence of "probable cause" or "reasonable suspicion," but rather on a balancing of the competing interests involved in light of all the surrounding facts and circumstances. *See South Dakota v. Opperman*, 428 U.S. 364, 49 L. Ed. 2d 1000, 96 S. Ct. 3092 (1976). Here, an individual's interest in proceeding about his business unfettered by police interference must be balanced against the public's interest in having police officers perform services in addition to the traditional enforcement of penal and regulatory laws. *United States v. Dunbar*, 470 F. Supp. 704 (D. Conn.), *aff'd*, 610 F.2d 807 (2d Cir. 1979). This latter interest is sometimes characterized as "community caretaking functions." *Cady v. Dombrowski*, 413 U.S. 433, 441, 37 L. Ed. 2d 706, 93 S. Ct. 2523 (1973).

One might argue that permitting police officers to make stops without "probable cause" or at least "reasonable suspicion" is so fraught with the potential for abuse that a blanket proscription is necessary. We believe that such an approach is an unnecessarily harsh remedy in light of the safeguards offered by a suppression hearing. We trust that the trial judge will discern a legitimate stop from one based on subterfuge.[5] Accordingly, we hold that, in appropriate circumstances, a police officer may stop a vehicle momentarily to warn the occupants that an item of their property is endangered. Such a momentary seizure, being "reasonable," does not require the suppression of contraband or other evidence of crime thereafter discovered merely because the officer lacked probable cause or reasonable suspicion to believe the vehicle's occupants were involved in criminal activity.

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[5] The trial court made precisely that determination in the case at bar.

Id. at 866-67 (footnotes omitted). The *Chisholm* court noted some examples of the community caretaking function in areas not dealing with automobiles: "Many communities look to their officers to assist citizens or render aid under a variety of circumstances. For example, officers often deliver emergency messages, give directions, search for lost children, assist stranded motorists and render first aid." *Id.* at 867 n.3.

In *State v. Hutchison*, 56 Wn. App. 863, 785 P.2d 1154 (1990), police encountered Hutchison lying unconscious on his back in a parking lot and searched his person for identification and information on his condition. In the course of the search, the officer discovered a controlled substance. Hutchison was charged with two counts of possession of a controlled substance with intent to deliver. At the pretrial suppression hearing, the trial court suppressed the evidence on the ground no medical emergency or exigent circumstances existed to justify the warrantless search. The Court of Appeals reversed, saying:

> It has been recognized and accepted in numerous federal and state court decisions that police officers modernly are expected to render aid and assistance on a regular basis to persons who, although perhaps not in need of immediate professional medical treatment, are in danger and in need of help. Searches performed as a part of providing such aid, if reasonable and in good faith, are generally allowed.
>
> . . . .
>
> In this instance, it is undisputed that at the time of the search, Hutchison was in need of aid and assistance. Officer Blair had a reasonable and legitimate concern that Hutchison would be in danger if abandoned in the parking lot. The trial court found that

> the officer did not search Hutchison for criminal investigatory purposes but in an effort to determine what should be done with him.

Id. at 865, 867.[6] This case fits neatly into the public safety category of the community caretaking doctrine.

State v. Menz, 75 Wn. App. 351, 880 P.2d 48 (1994), *review denied*, 125 Wn.2d 1021, 890 P.2d 463 (1995), is a more recent example of the public safety category. Police responded to an anonymous domestic violence call. When they reached the residence, they found the front door open five or six inches. The lights were on and a television was playing, but no one responded to their knocks and announcements of their presence. Concerned for the safety of the occupants, they entered the house and began searching for persons that might be hiding or incapable of responding. Entering a bedroom, they discovered marijuana plants. They left, obtained a search warrant, and returned to seize the plants.

At the suppression hearing, Menz argued the warrantless search of his home was illegal. The trial court denied the motion to suppress, and the Court of Appeals affirmed, employing the public safety branch of the community caretaking doctrine as justification for the search:

> [T]he police in this case were told that domestic violence was occurring. They had reason to believe people were home because the front door was open on a winter night, the lights were on, and the TV was playing. Yet they could not get anyone to answer the

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[6] The Division Two panel in this case consisted of three pro tempore judges: retired Superior Court Judge Schumacher, who wrote the opinion, and Justices Pearson and Utter.

> front door. As we have already explained, these circumstances generated a reasonable concern for the well-being of the home's occupants[ ]

Id. at 355.

We, too, have long recognized officers may detain individuals without a warrant if one of the categories of community caretaking is involved. *See State v. Loewen*, 97 Wn.2d 562, 647 P.2d 489 (1982) (search of auto accident victims for identification); *State v. Jordan*, 79 Wn.2d 480, 487 P.2d 617 (1971) (warrantless entry of motel room to examine defendant at request of motel maid where defendant appeared gray and unmoving on bed). These cases fit into the medical emergency category of the community caretaking doctrine.

We have also expressly recognized the public safety category of the community caretaker doctrine. In *State v. Mennegar*, 114 Wn.2d 304, 787 P.2d 1347 (1990), officers arrested a person for driving under the influence and impounded his vehicle. They determined a passenger could drive the vehicle and checked the passenger's driver's license, revealing an outstanding arrest warrant. In a search incident to arrest on the warrant, the officers found drugs. We said:

> The question then becomes whether it was reasonable and legal for the officer to request the passenger's driver's license and check to insure that the license was valid before turning the intoxicated driver's vehicle over to the passenger. Whether such an encounter, made for noncriminal noninvestigatory purposes, is reasonable depends upon a balancing of the individual's interest in freedom from police interference against the public's interest in having the police perform a "community caretaking function".

Id. at 313. We unanimously upheld the officers' actions as an aspect of the community caretaker function and reversed the trial court's suppression of the evidence. More recently, in *Kalmas v. Wagner*, 133 Wn.2d 210, 943 P.2d 1369 (1997), we considered a federal civil rights violation claim against two deputy sheriffs who entered a tenant's premises at tenant's request as part of a landlord-tenant dispute. Citing *Mennegar*, we reiterated the rule: "Whether an encounter made for noncriminal noninvestigatory purposes is reasonable depends on a balancing of the individual's interest in freedom from police interference against the public's interest in having the police perform a 'community caretaking function.' " *Kalmas*, 133 Wn.2d at 216-17 (holding there was no unreasonable search because the tenant had invited the deputies into the residence). In *Mennegar* and *Kalmas*, we explicitly adopted the balancing rule set forth in *Chisholm*: "[A]n individual's interest in proceeding about his business unfettered by police interference must be balanced against the public's interest in having police officers perform services in addition to the traditional enforcement of penal and regulatory laws." *Chisholm*, 39 Wn. App. at 867 (footnote omitted) (citing *United States v. Brignoni-Ponce*, 422 U.S. 873, 878, 95 S. Ct. 2574, 45 L. Ed. 2d 607 (1975)).

The present case involves the fourth category of the community caretaking function: interactions between law enforcement and citizens mandated by statute. Arguably, such statutes express a strong public interest in law

enforcement action. We have not confronted this aspect of community caretaking by law enforcement, but in *State v. Dempsey*, 88 Wn. App. 918, 947 P.2d 265 (1997), the Court of Appeals addressed just such a situation. Dempsey's parents called the police after Dempsey threatened them and they feared for their safety. An officer who responded to the call found Dempsey to be paranoid, verbally abusive, and physically aggressive. The officer had to prevent Dempsey from assaulting his father in the officer's presence. *Id.* at 921. The officer decided to take Dempsey to a medical center for a mental health evaluation pursuant to RCW 71.05.150(4)(b).[7] The officer performed a search of Dempsey before putting him into his patrol car and discovered a large folding

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[7] The statute provides:

> (4) A peace officer may, without prior notice of the proceedings provided for in subsection (1) of this section, take or cause such person to be taken into custody and immediately delivered to an evaluation and treatment facility or the emergency department of a local hospital:
>
> . . . .
>
> (b) When he or she has reasonable cause to believe that such person is suffering from a mental disorder and presents an imminent likelihood of serious harm or is in imminent danger because of being gravely disabled.

knife and a bindle containing what was later identified as methamphetamine. He arrested Dempsey, who was convicted after the trial court denied his motion to suppress the methamphetamine evidence.

On appeal, Dempsey argued his detention was pretextual. *Dempsey*, 88 Wn. App. at 922. The Court of Appeals held, however, the search was justified:

> The relevant statutory language calls for the reasonable perception of "a substantial risk that physical harm will be inflicted by an individual upon another, *as evidenced by behavior which has caused such harm or which places another person or persons in reasonable fear of sustaining such harm . . . .*" former RCW 71.05.020(3)(b) (emphasis added). Once the basis for an involuntary commitment is established, authority for a protective search is implied by statute. *Lowrimore*, 67 Wn. App. at 956. Evidence discovered in furtherance of a caretaking function is admissible.

Id. at 923. *Accord State v. Mason*, 56 Wn. App. 93, 782 P.2d 572 (1989) (affirming conviction for possession of controlled substance discovered in a pat-down search of man taken into custody for mental health evaluation), *review denied*, 114 Wn.2d 1010, 790 P.2d 168 (1990).

Like *Dempsey*, the present case involves a noncriminal, noninvestigative police action -- the enforcement of a *civil* statute, the Family Reconciliation Act, chapter 13.32A RCW. The statute sets out a *mandatory duty* for law enforcement

officers to act and the police officers in this case acted pursuant to that statutory mandate. The Act states:

> (1) A law enforcement officer *shall* take a child into custody:
>
> . . . .
>
> (b) If a law enforcement officer reasonably believes, considering the child's age, the location, and the time of day, that a child is in circumstances which constitute a danger to the child's safety or that a child is violating a local curfew ordinance[.]

RCW 13.32A.050(1)(b) (emphasis added).[8]

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[8] Many courts have addressed the special status of juveniles and the need for special laws to protect them. In a frequently cited case, the United States Supreme Court said:

> The state's authority over children's activities is broader than over like actions of adults. This is peculiarly true of public activities and in matters of employment. A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens, with all that implies. It may secure this against impeding restraints and dangers, within a broad range of selection. Among evils most appropriate for such action are the crippling effects of child employment, more especially in public places, and the possible harms arising from other activities subject to all the diverse influences of the street. It is too late now to doubt that legislation appropriately designed to reach such evils is within the state's police power, whether against the parents claim to control of the child or one that religious scruples dictate contrary action.

Prince v. Massachusetts, 321 U.S. 158, 168-69, 64 S. Ct. 438, 88 L. Ed. 645 (1944) (footnote omitted) (upholding state statute forbidding juveniles to sell magazines on streets or public places and penalizing adults who furnish such publications for sale). The Family Reconciliation Act is a reflection of the concerns and policies the Supreme Court expressed in *Prince*.

The police testified they approached Kinzy in the first place because they were concerned about the possibility she might be in danger. Kinzy's diminutive stature made them think she was younger than her 16 years. She was in an area known for drug dealing and in the company of people the police knew to be involved in the drug culture. Pursuant to the statute, the police approached Kinzy to ascertain if she was "in circumstances which constitute a danger to the child's safety."[9] The statute required them to do that, and further required them to take Kinzy into custody if in fact her safety was in danger. It was in attempting to ascertain Kinzy's circumstances, as the statute required them to do, that the police seized her. The police did not stop Kinzy because of inchoate suspicions of criminal activity. They stopped her because they believed in good faith that an 11-to-13-year-old child on a downtown Seattle street at night in the company of known drug dealers might be at risk pursuant to chapter 13.32A RCW.[10]

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[9] The majority appears to be somewhat skeptical about the officers' reasons for approaching Kinzy, but the trial court found the officers' accounts of their activities to be entirely credible and not motivated by pretext. Kinzy does not appeal the trial court's findings on this account, and they are therefore verities.

[10] Justice Madsen states in her concurrence: "[Kinzy] did not appear to be in distress or in need of medical aid." Concurrence at 1. Justice Madsen evidently believes those are the only justifications for the police to have contacted Kinzy, short of probable cause to believe she had committed a crime. Like the majority, Justice Madsen ignores the at-risk children's statute, which *requires* police to take a child into custody if the officer reasonably believes the child is in circumstances "which constitute a danger to the child's safety." RCW 13.32A.050(1)(b). Justice Madsen also states in her concurrence: "The police were justified in their initial contact with [Kinzy] if they were legitimately attempting to determine if she was in need of assistance, *but once they determined*

The majority opinion recognizes RCW 13.32A.050 only in passing, ignoring the duty the statute placed on police to act when they believe a child may be at risk. Instead, the majority treats this case as if it were solely a matter of criminal procedure and determines officers may approach a child such as Kinzy but may not seize her without a warrant. However, the police in this case acted properly under the mandate of the Family Reconciliation Act, legislation designed to assist at-risk children. In the course of their statutory duty under the Act, the officers became reasonably suspicious Kinzy might be in the possession of contraband. She was, in fact, carrying cocaine. Kinzy has not argued the activities of the police leading to the discovery of the cocaine after they seized her were improper. She complains only about the seizure itself.

Although our cases clearly indicate the community caretaking function requires a balancing of the individual's liberty interest with the public's interest in having officers perform noncriminal investigative services, *Mennegar*, 114 Wn.2d at 313; *Kalmas*, 133 Wn.2d at 216-17, the majority's formulation of the question in this case dramatically misapplies the balancing test and instead treats the encounter here as a matter of criminal procedure. The question in this case,

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that she was not, their contact should have ended." Concurrence at 1 (emphasis added). The police never reached a determination about whether Kinzy was an at-risk child. There is no finding of fact to that effect, and the testimony of the police quoted in the majority opinion is to the contrary. Had the police actually decided Kinzy was not at-risk and then proceeded with a search anyway, such a search would have been prohibited. But that is not what happened.

properly formulated, boils down to this: if the police, in the furtherance of the mandate of RCW 13.32A.050, approach a juvenile, and the juvenile refuses to answer questions and attempts to leave before the police can determine whether the juvenile is "in circumstances which constitute a danger to the child's safety," is it reasonable for the police to seize the juvenile, i.e., make it so the juvenile is not free to leave, until they can complete their determination?[11] I believe the answer is yes, particularly with regard to children.

"[T]he police are permitted to engage persons in conversation and ask for identification even in the absence of an articulable suspicion of wrongdoing." *State v. Young*, 135 Wn.2d 498, 511, 957 P.2d 681 (1998). Moreover, "a police officer's conduct in engaging a defendant in conversation in a public place and asking for identification does not, alone, raise the encounter to an investigative detention." *State v. Armenta*, 134 Wn.2d 1, 11, 948 P.2d 1280 (1997). Thus, there was nothing wrong with the police officers' initial approach to Kinzy.

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[11] Although this case addresses only the rights of juveniles under the Family Reconciliation Act, the majority's treatment raises significant implications for all community caretaking functions, including the fourth category relating to civil statutes involving involuntary stops and detentions. *See* RCW 71.05.150 (detention of mentally disordered persons for evaluation and treatment); RCW 70.96A.140 (involuntary commitment of alcoholics and minors incapacitated by alcoholism or drug addiction); RCW 71.34.040 (temporary involuntary detention of minor for evaluation of need for mental health services); RCW 70.28.031 (providing for involuntary detention, testing, treatment and quarantine of tuberculosis patients).

We have held in the case of adults, one is free to disengage from a social contact with police, or simply to walk away from the scene if the police seek to engage. *See State v. Mendez*, 137 Wn.2d 208, 970 P.2d 722 (1999). Here, however, the police restrained Kinzy from walking away. They did so pursuant to their statutory duty to ascertain whether her safety was in danger.

The police acted in accordance with the statutory mandate here. It is only happenstance that the officers found Kinzy was involved in criminal activity. Pursuant to their statutory duty under the Act, officers are usually obliged to transport a child to the child's home or a crisis residential center and advise the child of the reasons for detention. RCW 13.32A.060(1).[12] If they legally could

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[12] The officers' statutory obligations are explicit and extensive:

> (2) Law enforcement custody shall not extend beyond the amount of time reasonably necessary to transport the child to a destination authorized by law and to place the child at that destination. Law enforcement custody continues until the law enforcement officer transfers the custody to a person, agency, or other authorized entity under this chapter, or releases the child because no placement is available. Transfer of custody is not complete unless the person, agency, or entity to whom the child is released agrees to accept custody.
>
> (3) If a law enforcement officer takes a child into custody pursuant to either subsection (1)(a) or (b) of this section and transports the child to a crisis residential center, the officer shall, within twenty-four hours of delivering the child to the center, provide to the center a written report detailing the reasons the officer took the child into custody. The center shall provide the department with a copy of the officer's report.

have done that, they certainly could have detained her briefly on the street to further their determination of whether she was at risk.

That the police acted pursuant to the at-risk children statute apparently makes no difference to the majority.[13] It appears the majority would require a

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> (4) If the law enforcement officer who initially takes the juvenile into custody or the staff of the crisis residential center have reasonable cause to believe that the child is absent from home because he or she is abused or neglected, a report shall be made immediately to the department.
>
> (5) Nothing in this section affects the authority of any political subdivision to make regulations concerning the conduct of minors in public places by ordinance or other local law.
>
> (6) If a law enforcement officer receives a report that causes the officer to have reasonable suspicion that a child is being harbored under RCW 13.32A.080 or for other reasons has a reasonable suspicion that a child is being harbored under RCW 13.32A.080, the officer shall remove the child from the custody of the person harboring the child and shall transport the child to one of the locations specified in RCW 13.32A.060.

RCW 13.32A.050(2) through (6).

[13] Serious questions about dereliction of duty would have arisen had the officers let Kinzy walk away simply because that is what she wanted to do. As Judge Agid put it:

> When an officer believes in good faith that someone's health or safety may be endangered, particularly if that person is known to have physical or mental problems, public policy does not demand that the officer delay any attempt to determine if assistance is needed and offer that assistance while a warrant is obtained. To the contrary, the officer could be considered derelict by *not* acting promptly to ascertain if someone needed help.

warrant for *any detention*, even for the reasons set forth in RCW 13.32A.050 or .060 for the child's protection. As noted above, however, the police could not have obtained a warrant because they had no probable cause to suspect criminal activity when they first detained Kinzy.

Under the majority's formulation, officers could approach a 10-year-old runaway dressed like Jodie Foster in the film "Taxi Driver" and inquire if she were in danger. If she were to say no, the officers could do no more. According to the majority opinion, if the officers wanted to detain her, they would need to somehow obtain a warrant. In the majority's view, even young age does not appear to be a sufficient factor, even coupled with compelling circumstances, to justify detaining the juvenile in order to ascertain if he or she is in danger. It is difficult to discern how, in the real world, the runaway youth, the uncooperative tuberculosis patient, or the mentally ill person would conveniently stay in place while the officers got the warrant, assuming a warrant is even available.[14]

State v. Gocken, 71 Wn. App. 267, 276, 857 P.2d 1074 (1993) (upholding warrantless search when police were summoned by a relative fearful of elderly aunt's health), *review denied*, 123 Wn.2d 1024, 875 P.2d 635 (1994). The same reasoning applies to situations in which children may be at risk.

[14] This is not an idle concern. Consider the circumstance in a case we decided last year:

> McClenahan had returned to his mother's Lynnwood house after extensive travel, appearing disheveled, having lost all of his clothing during his journeys. At his mother's home, McClenahan engaged in imaginary conversations and advised his mother that people were out to get him, monitoring him via satellites and radio waves.

The majority opinion leads inevitably to one of the following results: (1) stops or detentions under civil statutes like those involving children at risk, alcoholics, the sick, or the mentally ill are forbidden unless they meet the constitutional standards for criminal matters; or (2) any evidence of a crime discovered in the legitimate furtherance of civil statutes must be suppressed. The first alternative eviscerates statutes designed to aid the most helpless and vulnerable members of society. The second alternative eviscerates the "plain

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> McClenahan's mother finally locked him out of her house until he agreed to take his medications. In response, McClenahan stood outside in the rain for hours and finally climbed onto the roof of his mother's house, where he began running around, striking the skylight, and screaming. McClenahan's mother phoned the local police.

In re Detention of A.S., 138 Wn.2d 898, 905-06, 982 P.2d 1156 (1999). Here, the police responded to the call of McClenahan's distraught mother on a matter that had no criminal overtones. The police took McClenahan into custody pursuant to chapter 71.05 RCW, the involuntary civil commitment act. If a search of McClenahan incident to his being taken into custody had revealed contraband, he might have been charged criminally. Under the majority's rule in this case, that evidence would have to be suppressed because the police had no warrant to seize him in the first place.

What would the majority have the police do in such cases? They could not have obtained a warrant because when they observed McClenahan running around on the roof of his mother's house striking the skylight and screaming, they had no probable cause to believe any criminal activity was afoot. If they had called up to McClenahan and asked him to come down, and he said in response, "Go away and leave me alone; I am just fine," should the police have simply departed after telling Mrs. McClenahan to have a nice day? That is the result the majority opinion demands.

view" or "open view" doctrine. Neither alternative can be correct. The practical effect of the majority's unprecedented analysis is that police officers have no authority to detain a person no matter how compelling or dangerous the circumstances of the person's situation, absent a warrant issued pursuant to criminal procedure.

It is curious this issue should arise today, because these questions were settled at common law hundreds of years ago: "The authority to restrain a dangerously insane person also appears to have existed at common law[.]" *Plancich v. Williamson*, 57 Wn.2d 367, 369, 357 P.2d 693, 92 A.L.R.2d 559 (1960) (citing 1909 Vermont case). Nor did our judicial ancestors lack our modern, refined sensibilities regarding the countervailing liberty interests of detained mentally impaired persons. In an 1871 case in which the complaint was for "unlawful arrest" by a deputy constable of a person alleged to have been insane, incapable of taking care of himself, and conducting himself in a wild and irrational manner, the Massachusetts Supreme Judicial Court said:

> The right which every citizen has to enjoy personal liberty is necessarily subject to some exceptions. . . . Among them, are the right to restrain a person who . . . has fallen in a fit, or is so sick as to be helpless, or is unconsciously going into great danger, or is drunk, or has delirium tremens, or is so insane as to be dangerous to himself or others. In such cases, the right to restrain persons has its foundation in a reasonable necessity, and ceases with the necessity.

Look v. Dean, 108 Mass. 116, 120 (1871). Similarly, our Legislature, out of understandable and laudable concern for children at risk, mandated investigation and action by police in circumstances like those in the present case.

The majority dramatically diminishes law enforcement's community caretaker role generally, and specifically renders unenforceable chapter 13.32A RCW and similar civil statutes authorizing detention of individuals in distress. I decline to analyze every encounter between police and citizens as a proto-criminal investigation to be interpreted under our rules for criminal procedure. I decline to vitiate statutes designed to safeguard the vulnerable. I respectfully dissent.

Talmadge, J.

I concur,

Bridge, J.

Ireland, J.

Tony, C. J.